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Tribal Citizen Participation in State and National Politics: Welcome Wagon or Trojan Horse?

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TRIBAL CITIZEN PARTICIPATION IN STATE AND NATIONAL POLITICS: WELCOME WAGON OR TROJAN HORSE?

Michael D. Oeser[†]

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“[L]awyers have expended much paper and ink learnedly struggling to discover some elegant and hitherto obscure common denominator among the courts’ products. Like medieval theologians, they avoid confrontation with their system’s fatal paradoxes by immersing their thoughts in trivial comparisons and nice distinctions.”¹

“The notion that the right to vote and other manifestations of citizenship might reflect defeat for a group rather than victory is not one that many of us are likely to immediately realize, but it is one that American Indian history forces us all to consider.”²

I. INTRODUCTION

In the 1760s and 1770s, British Parliament passed laws requiring American colonists to pay taxes on everything from playing cards to newspapers to tea.³ Parliament also required the colonists to house the British soldiers sent to enforce these taxes.⁴ The vast majority of colonists neither consented to nor had a hand in drafting these laws,

1. RUSSEL LAWRENCE BARSH & JAMES YOUNGBLOOD HENDERSON, *THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY* xii (1980).

2. *AMERICAN INDIANS AND U.S. POLITICS: A COMPANION READER* 49 (John M. Meyer ed. 2002).

3. See CHARLES A. BEARD & MARY R. BEARD, *A BASIC HISTORY OF THE UNITED STATES* 91–96 (1944).

4. See *id.* at 96.

and these laws only applied to American colonists. No one in Parliament, or anywhere else in the British Empire, shared the burden of these laws. The situation eventually led the colonists to reject British authority, to the cry of “[n]o taxation without representation . . . [!]”⁵

One hundred and seventy years later, two citizens⁶ of the Mohave-Apache Tribe faced similar political exclusion but sought a different result—incorporation into the opposing sovereign instead of separation from it.⁷ Frank Harrison and Harry Austin both lived on the Fort McDowell Reservation. Harrison had risked his life in the U.S. military during World War II. Both paid taxes to the State of Arizona and the federal government. Shortly after the war, Harrison and Austin went to the Maricopa County Recorder’s office to register to vote. The County Recorder refused to register them, stating that they were wards of the federal government and therefore lacked the requisite competency. Harrison and Austin responded by suing to enforce their right to vote, resulting in *Harrison v. Laveen*, the seminal case affirming the right of reservation citizens⁸ to vote in state elections.⁹

Similar decisions followed,¹⁰ but for many years, most tribal citizens did not vote in non-tribal elections.¹¹ Some did not vote because anti-tribal interests went to great lengths to discourage or prohibit

5. *Id.* at 97.

6. Many people, tribal and non-tribal, use the term “member” to refer to individuals formally enrolled in a tribe as part of the tribe’s body politic. Members of a sovereign body politic are more accurately referred to as “citizens,” at least in a democratic context. Because vocabulary influences perception, and the use of the term “member” marginalizes the sovereign aspect of tribes, this paper will use the term “tribal citizen.” *Cf. infra* note 8.

7. *See Harrison v. Laveen*, 196 P.2d 456, 457–58 (Ariz. 1948) (holding that Indians have the right to vote in Arizona elections for state and federal officers).

8. For purposes of this article, “reservation citizens” are reservation residents who are also citizens of, i.e. “enrolled in,” the tribe that governs the reservation on which they live. “Tribal citizens” are individuals who are formally enrolled in a tribal government but might live on or off their tribe’s reservation. “Non-citizen Indians” are individuals who live on a reservation other than the reservation of the tribe in which they are enrolled (for instance, a Navaho citizen who lives on the Rosebud Sioux Reservation). *Cf. supra* note 6.

9. *Harrison*, 196 P.2d at 463.

10. *Little Thunder v. South Dakota*, 518 F.2d 1253 (8th Cir. 1975); *Prince v. Bd. of Educ. of Cent. Consol. Indep. Sch. No. 22*, 543 P.2d 1176 (1975); *Montoya v. Bolack*, 372 P.2d 387 (1962); *cf. Acosta v. San Diego County*, 272 P.2d 92 (Cal. Ct. App. 1954).

11. *See infra* notes 12–14. “Non-tribal elections” refers to national, state, and non-tribal local elections collectively.

voting by tribal citizens.¹² Others felt voting in state and federal elections inappropriate because they did not view themselves as citizens of either sovereign.¹³

Things have changed, however. Since the return of tribal veterans from World War II,¹⁴ the Civil Rights Era's campaign against race-based distinctions,¹⁵ the advent of successful tribal gaming enterpris-

12. See DANIEL MCCOOL ET AL., *NATIVE VOTE: AMERICAN INDIANS, THE VOTING RIGHTS ACT, AND THE RIGHT TO VOTE* 10–20 (2007) (discussing strategies by states to prevent or limit Indian voting); Danna R. Jackson, *Eighty Years of Indian Voting: A Call to Protect Indian Voting Rights*, 65 MONT. L. REV. 269, 275–81 (2004) (discussing the Voting Rights Act of 1965 which prohibits any individual action or law denying or abridging voting rights on account of race or color); Jeanette Wolfley, *Jim Crow, Indian Style: The Disenfranchisement of Native Americans*, 16 AM. INDIAN L. REV. 167, 167–92 (1991) (discussing various techniques used to exclude Indians from voting).

13. See Robert B. Porter-Odawi, *Two Kinds of Indians, Two Kinds of Indian Nation Sovereignty: A Surreply to Professor Lavelle*, 11 KAN. J.L. & PUB. POL'Y 629, 643 (2002) [hereinafter Porter, *Two Kinds of Indians*] (“[W]hy so many Senecas do not vote in the White Man’s elections was because we take pretty seriously the fact that we have our own nation, our own elections, and our own sovereignty.”); Robert B. Porter, *The Demise of the Ongwehoweh and the Rise of the Native Americans: Redressing the Genocidal Act of Forcing American Citizenship upon Indigenous Peoples*, 15 HARV. BLACKLETTER L.J. 107, 128 (1999) [hereinafter Porter, *The Demise*] (“This was a violation of our sovereignty. Our Citizenship was in our own nations. . . . There was no great rush among my people to go out and vote in the white man’s elections.”) (quoting Tuscarora Chief Clinton Rickard in Laurence Hauptman, *Congress and the American Indian*, in EXILED IN THE LAND OF THE FREE 3263 (Oren Lyons & John Mohawk eds., 1991); David Wilkins, *An Inquiry into Indigenous Political Participation: Implications for Tribal Sovereignty*, 9 KAN. J.L. & PUB. POL'Y 732, 734 (2000) (“Part of the reason for the reluctance or refusal of political scientists to examine indigenous political participation rests on the fact that politically tribal nations, generally—although this is changing for some tribes—do not consider themselves to be part of the pluralistic mosaic that is predominant in political science literature. Tribes perceive of themselves not only as pre-constitutional entities, but more importantly, as extra-constitutional polities.”); see also THEODORE W. TAYLOR, *THE STATES AND THEIR INDIAN CITIZENS* 91 n.30A (1972) (citing Letter from Edward C. Hinckley, former Commissioner of Indian Affairs for Maine, to Thomas Tureen (March 24, 1972)) (“Some Maine Indians publicly opposed the removal of the constitutional exception and the granting of the right to vote because they saw it ‘as a step to[]wards the termination of the special Indian-State relationship.’”) (quoting Letter from Edward C. Hinckley, former Commissioner of Indian Affairs for Maine, to Thomas Tureen (Mar. 24, 1972)).

14. See MCCOOL ET AL., *supra* note 12, at 9–10 (“Indian veterans, returning home after service in World War II, played a pivotal role in fighting for the right to vote.”); U.S. PRESIDENT’S COMMITTEE ON CIVIL RIGHTS, *TO SECURE THESE RIGHTS: THE REPORT OF THE PRESIDENT’S COMMITTEE ON CIVIL RIGHTS* 32–40 (1947) (noting that many barriers to right of citizenship and its privileges, including voting, were removed after World War II).

15. See COLIN G. CALLOWAY, *FIRST PEOPLES: A DOCUMENTARY SURVEY OF AMERICAN INDIAN HISTORY* 459–60 (3d ed. 2008) (discussing the organization of the American Indian Movement in the summer of 1968); JOANE NAGEL, *AMERICAN INDIAN ETHNIC RENEWAL: RED POWER AND THE RESURGENCE OF IDENTITY AND CULTURE* 95, 130–37,

es,¹⁶ and the Indian Gaming Regulatory Act's imposition of state compacting requirements,¹⁷ tribes and tribal citizens have become more and more involved in local, state, and national politics.¹⁸ Today, tribes and tribal citizens vote, donate, lobby, and serve in elected office more than ever.¹⁹ Tribal leaders formed the National Congress of American Indians (NCAI) in 1944 in order to encourage such participation—at the national level at first, but later pushing state involvement.²⁰ Political parties and candidates have increased the time and attention paid to tribal populations as races tighten in battleground states.²¹ As of July 2009, the National Caucus of Native American State Legislators listed thirty enrolled tribal citizens serving

158–84 (1996) (discussing the Civil Rights Era's influence on the increase in individuals identifying as Native American and the Red Power movement); John P. LaVelle, *Strengthening Tribal Sovereignty Through Indian Participation in American Politics: A Reply to Professor Porter*, 10 KAN. J.L. & PUB. POL'Y 533, 535–51 (2001)) (criticizing Professor Porter's view of the Red Power Movement and arguing its positive effects on Indian rights); Porter, *The Demise*, *supra* note 13, at 143–46 (noting the positive effects of the Red Power movement and the American Indian Movement).

16. James Dao, *Indians' New Money Buys Lobbying Power*, N.Y. TIMES, Feb. 9, 1998, at B1, ("Indians, of course, have been coming to Washington for as long as it has existed, to talk over treaty rights and other issues. And since the early 1990's at least, tribes have been using newfound gambling wealth to expand their political muscle."); Wilkins, *supra* note 13, at 732 ("[S]ince the late 1980s, and largely as a result of Indian gaming, there now exists a situation where some tribal governments, acting, they argue, in a sovereign capacity, are not only proactively supporting state and federal office seekers (in addition to tribal office seekers) by making significant financial contributions to American political campaigns (in addition to their own tribal campaigns), but are also weighing in on issues—like the national tobacco litigation—that seem unrelated to tribal affairs [G]ambling wealth is providing some tribes with opportunities to employ skilled lobbyists, savvy public relations firms, and make large campaign contributions . . . in a manner heretofore unknown.").

17. The Indian Gaming Regulatory Act (hereinafter "IGRA") requires tribes to enter an agreement with the surrounding state (a "compact") before beginning gaming activities. 25 U.S.C. § 2710(d)(1)(C) (2006). *See also* Porter, *The Demise*, *supra* note 13, at 150–51 ("One of the main reasons for this increase in political activity appears to be the need to safeguard gaming rights, a phenomenon that has emerged in the last ten years to make a few select Indian nations extremely wealthy and allowed many more to generate modest income to support tribal government operations.") (citing Tim Johnson, *The Dealer's Edge: Gaming in the Path of Native America*, 12 NATIVE AMERICAS, 16 (1995)).

18. *See supra* notes 14–18 and accompanying text.

19. *See supra* notes 14–18 and accompanying text.

20. THOMAS W. COWGER, *THE NATIONAL CONGRESS OF AMERICAN INDIANS: THE FOUNDING YEARS* 9, 44, 64–65 (1999).

21. MCCOOL ET AL., *supra* note 12, at 176–83; National Congress of American Indians' 2008 Native Vote Campaign, *The American Indian Vote: A Brief History & Current Obstacles*, <http://nativevote.org/images/docs/> (follow "The American Indian Vote: A Brief History 2004 pdf" hyperlink) (last visited Nov. 12, 2009).

as elected state officials.²² Many represent districts that coincide with reservation territory.²³

Some scholars have sternly attacked tribal citizen participation in state and federal politics, asserting that such participation undermines tribal sovereignty.²⁴ Others have staunchly defended such participation, welcoming the benefits participation has brought and asserting those benefits as proof that the best way to defend tribal interests is through such participation.²⁵ In a recent press release, NCAI President Joe A. Garcia said, “[i]ncreasing civic participation among American Indian and Alaska Native communities is imperative to protecting sovereignty and ensuring Native issues are addressed on every level of government.”²⁶

Through it all, tribes and tribal citizens have asserted—with varying levels of success—that the non-tribal laws they participate in making do not, or should not, apply to reservation territory or residents. As a consequence of this paradigm, reservation citizens who participate in state politics end up imposing laws and duties on citizens of the surrounding state—laws and duties which reservation citizens generally have no obligation to obey or subsidize. In this way, tribes and tribal citizens living on reservations assume the same position as British Parliament of the 1760s vis-à-vis American Colonists. A position more diametrically opposed to basic American political principles—contrary to the basic shared American parable—could not exist. Participation by reservation residents appears unfair when viewed in light of universally-accepted American political concepts,²⁷ a point still routinely asserted by opponents of tribal

22. List from Linda Murakami Sikkema, Director, National Caucus of State Legislators, State-Tribal Institute, to Michael D. Oeser (July 7, 2009; on file with author); National Caucus of Native American State Legislators, <http://www.nativeamericanlegislators.org/Public%20Documents/Caucus%20Membership.aspx> (last visited Nov. 3, 2009) (copy on file with author). This figure excludes representatives from Alaska and Hawaii. Adding these states, the total rises to 35.

23. Survey done by Cate Kellett and Melissa Holds the Enemy at the Great Lakes Indian Law Center in June, July, and August 2009 (on file with author).

24. Porter, *Two Kinds of Indians*, *supra* note 13, at 635–36, 639, 647–49; Porter, *The Demise*, *supra* note 13, at 169–70, 173–74.

25. MCCOOL ET AL., *supra* note 12, at 194; *see generally* LaVelle, *supra* note 15 (arguing that the most appropriate means to assert tribal interests is to actively participate in state and federal politics).

26. Press Release, Nat’l Congress of Am. Indians, NCAI Rolls Out 2008 Native Vote Initiative at Annual Convention in Denver (Nov. 12, 2007).

27. AMERICAN INDIAN POLICY REVIEW COMMISSION, 94TH CONG., FINAL REPORT 579 (Comm. Print 1977) (“Reservation Indians would be citizens of the State but be wholly free of State law and State taxation even though they participate in the

sovereignty.²⁸

This article focuses on the relationship between participation by reservation citizens in state and federal politics, and sovereign authority over reservation lands and residents. The article points out similarities between the theoretical tensions faced by the Founders relating to multiple sovereignties, and the dilemma faced by tribes today. This article identifies accelerating trends in the area of tribal political participation and analyzes them in light of four fundamental American political principals: (1) legitimate government derives its authority from the consent of the governed, (2) participation in a democratic political process constitutes consent to be governed by that process, (3) human beings inherently seek power as a result of self-interest, and (4) one sovereign will succumb to another where the two compete to exert authority over the same people, territory, or both. This article looks to the debates leading up to the ratification of the present U.S. Constitution for guidance on these principles. This approach provides a common political and ethical framework that most Americans understand and accept—a useful platform from which to advocate for tribal sovereignty to non-tribal audiences, including legislatures and courts.

This article ultimately asserts that, like the inhabitants of ancient Troy dragging a wooden horse inside the gates, reservation citizens are embracing the demise of tribal governments if they continue to participate in federal and state elections without taking steps to avoid

creation of State law and State taxing schemes. In short, reservation Indians would have all the benefits of citizenship and none of its burdens. On the other hand, non-Indian citizens of the State would have no say in the creation of Indian law and policy on the reservation, even if they were residents of the reservation, and yet be subject to tribal jurisdiction. In short, non-Indians would have all the burdens of citizenship but none of the benefits.”); TAYLOR, *supra* note 13, at 91 (“Historically there were practical problems with Indians voting in State elections. Indians living on a Federal reservation were frequently not subject to State or local laws while on the reservation. If they voted for State and county officials they participated in making laws or levying taxes not applicable to them but applicable to others. This situation is still true and it raises bothersome questions of equity from the non-Indian point of view.”).

28. Cindy Yurth, *Diné Racist, Anglo says*, NAVAJO TIMES, Apr. 16, 2009, at A1, available at <http://www.navajotimes.com/news/2009/0409/041609racism.php>; Cindy Yurth, *Navajos Take Over Apache County Government*, NAVAJO TIMES, Nov. 6, 2008, at A4, available at <http://www.navajotimes.com/news/2008/1108/110608apacheco.php>; cf. Martin Reed, *Candidates' Opinions Vary on Tribal Boundary Lawsuit*, WIND RIVER NEWS, Oct. 16, 2008, at 13; *Apache County Board of Supervisors Issues Minutes of Oct. 16 Special Meeting*, U.S. State News, Nov. 6, 2007, available at <http://www.navajocountyaz.gov/bos/minutes/2007/101607Min.pdf>; (discussing that after election, in Apache County, “Navajos will hold a majority of elected offices”).

the sovereign conflict that results. No one can deny that tribes and their citizens have had greater success in non-tribal politics in recent years, becoming better able to influence legislation and policy targeting tribes.²⁹ However, by participating in non-tribal political processes, tribes and tribal citizens consent to state and federal jurisdiction over reservation lands and residents. Such participation legitimizes present assertions of sovereignty within reservations, invites further assertions, undermines tribes' ability to advocate against the exercise of non-tribal jurisdiction over reservation territory, and exacerbates the three-way conflict between tribal, state, and federal sovereignty. Tribes have generally lost ground in this three-way conflict over time, suffering a piecemeal erosion of sovereignty similar to what The Founders thought would happen to the states absent clear, affirmative limitation of federal authority. This pattern suggests that multiple-sovereignty problems are responsible for tribes' sovereign losses and that addressing these problems may slow or halt those losses. If tribes continue down the present path, competition between the three sovereigns will ultimately hollow out tribal sovereignty, implicitly or explicitly. This article will show how participation-based analysis has played an increasing role in U.S. Supreme Court decisions reducing tribal sovereignty. Moreover, this article will suggest that a slight shift in focus in this reasoning—from how the denial of non-Indian participation in tribal politics limits tribal authority, to how the pursuit of participation by tribal peoples in non-tribal politics authorizes non-tribal authority—is a dangerous logical extension of this legal progression.

Because the status quo will result in continued losses of tribal sovereignty, tribes and tribal citizens must make a tough choice today if they want any control over how these tensions resolve tomorrow: active incorporation into non-tribal governments or active separation from them. Furthermore, the incorporate-or-separate decision must be made on two different levels—federal and state. Important distinctions between the tribal-federal relationship and tribal-state relationship suggest a different result in each instance.

Continued tribal participation at the federal level is likely in tribes' best interest. Federal law-making with regard to tribes is unlikely to abate. Because people governed by a particular political process have a right—and a reason—to participate in that process, tribes have a vested interest in participation in the federal law-making

29. See *infra* Part II.C.

process. However, the need for continued federal participation makes establishing limits on federal authority imperative to avoiding continued losses of tribal sovereignty. Fortunately, a successful model for limitation of federal power readily presents itself—the Tenth Amendment.

In contrast, tribal participation in state political processes seems less imperative and less amenable to a stable limitation of power that would leave tribes more autonomous than not. States generally have not legislated over tribes, making tribal participation in state political processes less necessary to protect tribal interests.³⁰ Moreover, whereas a stable model for dual citizenship/authority already exists in the tribal-federal context, the same cannot be said for a three-way, tribal-state-federal division of citizenship/authority. Even if a stable, consent-based model could be established, a three-way split could easily result in tribes losing further sovereignty. This suggests the absence of a middle ground where tribal, state, and federal citizenship can meaningfully co-exist from a tribal perspective. In the absence of a middle ground, tribes need to make a clear decision to incorporate or separate.

Tribes choosing active incorporation could use the states' desire for dominion over tribal lands to affirmatively preserve some, but probably not all, of the benefits tribes enjoy as separate sovereigns. Tribes choosing to separate from the state would have to give up any benefits realized through voting in non-tribal elections and service in non-tribal office, but could stem the erosion of their sovereignty, and possibly stabilize their relationship with surrounding states through intergovernmental agreements.

While choosing incorporation or separation cannot involve an ethical imperative if individual autonomy is to be respected, making some choice very well may. Asserting the ability to participate without being subjected to the products of that participation presents a hypocritical position that Congress or the U.S. Supreme Court will likely resolve to the detriment of tribes over time. Continued participation creates reasons and opportunities for the federal legislature and courts to further erode tribal sovereignty, some of which may occur before tribes that choose to buttress their sovereignty through political separation can do so effectively.

30. Even in those states that have legislated over tribes via Public Law 280, serious questions about the legitimacy of such legislation arise given that no tribe consented to the exercise of state legislative power. See *infra* notes 129–32 and accompanying text.

Part II of this article will review the legal and historical development of reservation citizens' right to participate in federal and state politics. This review will provide perspective on the extent of tribal political participation, and thus provide a basis for subsequent analysis. The review will also give readers a basis for judging the costs and benefits of ending such participation. Part II will then specifically examine the cases establishing this right to vote, placing them in the larger anti-tribal policy context from which they arose, and explaining how they represented a lost opportunity to promote tribal sovereignty by separating tribal and state authority in terms of both person (citizenry) and place (territory). Part III will consider the foundations of the four previously mentioned concepts of American political thought and law. Part IV will evaluate the implications of various types of participation by tribes, tribal citizens, and reservation citizens in non-tribal political processes. Part IV will also point to evidence suggesting that the type of piecemeal destruction of subordinate sovereigns predicted by opponents of the 1789 Constitution is happening to tribes today in the manner and at the pace predicted by those opponents. Part IV will close by suggesting some alternative courses of action for tribes should they choose to politically incorporate with states or separate from them.

II. KICKING THE TIRES ON THE WELCOME WAGON: THE DEVELOPMENT AND STATUS OF TRIBAL VOTING AND PARTICIPATION

Making an informed decision about whether or not to participate in non-tribal politics requires perspective on each alternative. This makes a brief review of the history of and benefits gained from participation in non-tribal politics by tribes and tribal citizens. This review will demonstrate the extent of tribal involvement in non-tribal politics, a factor relevant to the later analysis. Additionally, this review will provide the basis for determining appropriate remedial action should a tribe choose to avoid the consequences of such participation.

A. *Federal and State Citizenship: Becoming Part of the American Body Politic*

The Federal Constitution did not specifically define who was and was not a citizen at first.³¹ Arguably it made oblique reference to some

31. William Ty Mayton, *Birthright Citizenship and the Civic Minimum*, 22 GEO.

standard for citizenship when it described the qualifications for various offices,³² and implied that citizenship was related to apportionment and taxation.³³ Whatever it did to define citizenship, it was at least equally clear that Indians who maintained societal and political ties with their tribes, i.e. those “not taxed,” were not citizens.³⁴

The Fourteenth Amendment introduced a broad, specific definition of citizenship, designed to eliminate racial distinctions with regard to citizenship.³⁵ However, to the surprise of many non-Indians today, “tribal” Indians, i.e. those “not taxed,” did not fall within this exception because the basis for excluding “tribal” Indians was not racial; it was *political*. In *Elk v. Wilkins*, the U.S. Supreme Court held that native people born into their respective tribes did not qualify as citizens simply by “abandon[ing their] tribal relations,”³⁶ and went into great detail with regard to how separate tribes and their citizens were from states and state citizens.³⁷ Tribal citizens were not “subject to the jurisdiction” of the United States. They did not pay the state or federal taxes generally associated with citizenship, were not counted in apportioning representation, generally were not subject to non-tribal law, and had only been naturalized previously by specific treaties or legislative acts.³⁸ Consequently, tribal citizens could only become federal and state citizens with the express consent of the United States via established naturalization laws and processes,³⁹ just like the vast majority of other foreign nationals. *Elk*’s holding gave strong support to tribal sovereignty by equating tribes with foreign governments, thus

IMMIGR. L.J. 221, 228–29 (2008).

32. See U.S. CONST. art. 1, § 2, cl. 2 (Representatives); U.S. CONST. art. 1, § 3, cl. 3 (Senators); U.S. CONST. art. 2, § 1, cl. 5 (President).

33. See U.S. CONST. art. 1, § 2, cl. 3.

34. See *Scott v. Sanford*, 60 U.S. 393, 403–04 (1856), *superseded by statute*, U.S. CONST. amend. XIV, § 1.

[Indian tribes] formed no part of the colonial communities, and never amalgamated with them in social connections or in government. [T]hey were . . . a free and independent people, associated together in nations or tribes, and governed by their own laws. . . . These Indian Governments were regarded and treated as foreign Governments, as much so as if an ocean had separated the red man from the white

Id. at 403–04 (alteration in original).

35. See U.S. CONST. amend. XIV, § 1. The Fourteenth Amendment sought to include all former slaves in an effort to combat slavery and its vestiges: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States”

36. 112 U.S. 94, 106 (1884) (alteration in original).

37. See *id.* at 99–109.

38. See *id.* at 102–07.

39. See *id.* at 109.

reaffirming Americans' historic understanding that tribal peoples were neither federal nor state citizens. They were politically separate in terms of both government and territory.⁴⁰

The United States naturalized many tribal citizens via treaties and legislation prior to 1924.⁴¹ By 1924 only about a third of all tribal people were not already U.S. citizens.⁴² The Citizenship Act of 1924 unilaterally imposed U.S. citizenship on all remaining tribal citizens,⁴³ in spite of the fact that Americans, from the time of the Revolution, have espoused the idea that legitimate government requires the consent of the governed.⁴⁴ Some tribes and individual Indians actively opposed the Act; these dissenters were nonetheless subject to the draft and federal taxes.⁴⁵ Opposition to dual federal-tribal citizenship

40. See generally THE FEDERALIST NO. 3 (John Jay) (discussing hostilities between Indian inhabitants and States), NO. 25 (Alexander Hamilton) (discussing the separateness of Indian nations), NO. 42 (James Madison) (concerning dangers from foreign force and influence); see also Northwest Ordinance of 1787, art. III, ch. VIII, 1 Stat. 50, 52 (1789); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823); Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 136 (2002) (citing VI REG. DEB., CONGRESS, 1056, 1059 (1830)).

41. See, e.g., Act of Mar. 3, 1901, 31 Stat. 1447 (providing for extension of citizenship to the Indians in the Indian Territory); Act of Mar. 3, 1921, 41 Stat. 1249, 1249–50 (granting citizenship to members of the Osage Tribe); Act of Mar. 3, 1843, 5 Stat. 647 (naturalizing the Stockbridge tribe of Indians); Act of Nov. 6, 1919, 41 Stat. 350 (granting U.S. citizenship to Indians who served in the U.S. military during World War I); Act of Aug. 9, 1888, 25 Stat. L. 392 (granting U.S. citizenship to Indian women who married U.S. citizens); Treaty with the Cherokee art. 8, July 8, 1817, 7 Stat. 1256; Treaty with the Cherokee, art. 2, Feb. 27, 1819, 7 Stat. 195, 196; Treaty with the Choctaw art. 14, Sept. 27, 1830, 7 Stat. 333, 335; Treaty with the Ottawa art. 4, June 24, 1862, 12 Stat. 1237, 1238; Treaty with the Seneca, Mixed Seneca, Shawnee, Quapaw, etc. art. 13, 17, 28, Feb. 23, 1867, 15 Stat. L. 513.

42. McCool, *supra* note 12, at 7–8; LYMAN TYLER, A HISTORY OF INDIAN POLICY 110 (1973); WILCOMB WASHBURN, RED MAN'S LAND/WHITE MAN'S LAW 164 (Univ. Okla. Press, 2d ed. 1995); Gary C. Stein, *The Indian Citizenship Act of 1924*, 47 N.M. HIST. REV. 257, 257 (1972).

43. See Citizenship Act of 1924, ch. 233, 43 Stat. 253 (1924) (codified as amended at 8 U.S.C. § 1401(b) (2006)); Porter, *The Demise*, *supra* note 13, at 124. The Nationality Act of 1940 attempted to clear up doubt created by the language of the Act of 1924 as to the status of Indians born after the effective date of the prior Act. See Ch. 876, 54 Stat. 1137, 1138 (1940) (codified at 8 U.S.C. § 1401 (2000)).

44. See *infra* Part III.A and accompanying text.

45. See *Squire v. Capoeman*, 351 U.S. 1, 6 (1956) (holding that Indians are subject to federal taxation “in the ordinary affairs of life”); *Choteau v. Burnet*, 283 U.S. 691, 696 (1931) (holding that federal income taxes apply to Indians absent a treaty or statutory tax exemption); *Totus v. United States*, 39 F. Supp. 7, 12 (E. D. Wash. 1941) (holding Tribal Indians to be subject to the Selective Training and Service Act of 1940, 50 U.S.C.A. §§ 301–303 (repealed 1956)); AMERICAN INDIANS AND U.S. POLITICS, *supra* note 2; COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 676–84 (Nell

continues today.⁴⁶ Some dispute the constitutionality of the act.⁴⁷

Outside the reservation context, people who gain U.S. citizenship simultaneously become citizens of the states in which they reside.⁴⁸ Federal and state case law assumes that reservations are part of the states in which they exist and that therefore the same rule applies for reservation residents,⁴⁹ although reason to doubt that conclusion exists.⁵⁰

Jessup Newton et al. eds. 2005) [hereinafter COHEN] (§ 8.02 (2) (b) "Federal Taxes: Federal Taxation of Tribes and Indians: Income, Estate, and Gift Taxation of Indians).

46. See Chief Irving Powless, Jr., Speech to the University of Buffalo Law School (Mar. 21, 1998), reprinted in *The Haudenosaunee, Yesterday and Today*, 46 BUFF. L. REV. 1081, 1083 (1998):

[The Iroquois Confederacy] have never accepted this law. We do not consider ourselves as citizens of the United States. This law is a violation of the treaties that we signed that prove that we are sovereign. Because we are a sovereign people, the United States cannot make us citizens of their nation against our will. . . . I have never voted in any election of the United States, and I do not intend to vote in any coming elections. Most of our people have never voted in your elections.

(alteration in original). See also Porter, *The Demise*, *supra* note 13, at 126–28, 159–60.

47. See Clinton, *supra* note 40, at 246–52; Kenneth W. Johnson, *Sovereignty, Citizenship And the Indian*, 15 ARIZ. L. REV. 973, 992 (1973); Porter, *The Demise*, *supra* note 13, at 135–39.

48. U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States *and of the State wherein they reside.*") (emphasis added).

49. See *Nevada v. Hicks*, 533 U.S. 353, 361–62 (2001); *Org. Vill. of Kake v. Egan*, 369 U.S. 60, 72 (1962); *Utah & N. Ry. Co. v. Fisher*, 116 U.S. 28, 32–33 (1885); *Harrison v. Laveen*, 196 P.2d 458, 458 (Ariz. 1948); *Acosta v. San Diego County*, 126 Cal. App. 2d 455, 463, 467; (1954); *Montoya v. Bolack*, 372 P.2d 387, 393–94 (N.M. 1962).

50. For instance, the Supreme Court's most recent pronouncement that reservations constitute part of the surrounding state rests on strikingly flawed precedent. See *Hicks*, 533 U.S. at 361–62. The *Hicks* Court ultimately based its assertion on a Department of Interior ("DOI") publication, *Org. Vill. of Kake v. Egan*, and *Utah & N. Ry. Co. v. Fisher*. *Id.* However, the DOI publication and *Kake* both rely on *Utah & N. Ry. Co. v. Fisher*. *Org. Vill. of Kake*, 369 U.S. at 72; U.S. Dept. of Interior, FEDERAL INDIAN LAW 510 n.1 (1958). *Utah & N. Ry. Co.* involved state taxation of a railroad line situated on a tract of land through an Idaho reservation. 116 U.S. at 28–29. The opinion seems to weave between three alternative arguments to find a way to validate the tax. *Id.* at 31–33. First, the Court ignores treaty language setting aside the reservation for the tribe's "absolute and undisturbed use," excluding all but "authorized" government agents, and requiring the consent of a majority of the adult males to cede further lands. *Id.* at 30. The Court brushes the treaty aside because prohibiting the tax was not "necessary" for the tribe to "enjoy the full benefit of the stipulations for their protection." *Id.* at 31–32. This reasoning is facially inconsistent with "absolute and undisturbed use" and seems to condescendingly say the tribe will just not know the difference. Next, the Court argues that the tribe ceded the tract where the rail line sat, thus subjecting it to state jurisdiction. *Id.* at 31–33. Assuming

B. *Crashing Through Initial Roadblocks to Participation*

Attaining federal and state citizenship gave tribal citizens the right to vote in federal and state elections, although the vast majority did not do so at first, mainly for two reasons. Many did not vote because anti-tribal interests went to great lengths to exclude tribal people from voting, often using tactics similar to those used to disenfranchise African Americans.⁵¹ At the same time, some tribal people felt that tribal citizenship, federal citizenship, and state citizenship were mutually exclusive.⁵² Both sides acknowledged vast cultural differences and generally lived in separate communities. The states had always been adversaries of the tribes.⁵³ Consequently, to vote in non-tribal elections would be meddling in the affairs of others, or worse, collaborating with the enemy.

Once Indians became citizens, non-tribal opponents of tribal voting rights in state elections commonly used four legal arguments to keep tribal people from voting:

- (1) Indians were under federal guardianship, or were federal “wards,” and therefore not independent and competent [to

the tribe ceded the land, the case ceases to stand for a reservation being part of the state. Last, the Court asserts that the building of the rail line inside the reservation alone somehow gave the state the right to tax it. *Id.* at 32–33. This again conflicts with the treaty language, and with common understandings of territorial jurisdiction. No one thought Idaho suddenly gained the right to tax Utah or Montana lands just because the Utah & Northern Railway Co. ran its tracks there.

51. See MCCOOL, *supra* note 12, at 10–19; Wolfley, *supra* note 12, at 181–92 (describing various justifications and tactics used by the states to deny Indians the right to vote); see generally United States Department of Justice, Introduction to Federal Voting Rights Laws, http://www.usdoj.gov/crt/voting/intro/intro_a.htm (last visited Nov. 12, 2009) (describing tactics used to disenfranchise African Americans).

52. See *supra* note 13, and accompanying text; Doug George-Kanentiio, *Why Iroquois will not Vote*, NEWS FROM INDIAN COUNTRY, Nov. 15, 1996, at 14A (“According to Iroquois law, [Iroquois citizens] are expressly prohibited from participating in the political process of an alien nation.”); Laurence M. Hauptman, *Congress, Plenary Power, and the American Indian, 1870 to 1992*, in EXILED IN THE LAND OF THE FREE 317, 326 (1992) (quoting Tuscarora Chief Clinton Rickard) (“The Citizenship Act did pass in 1924 despite our strong opposition. By its provisions all Indians were automatically made United States citizens whether they wanted to be so or not. This was a violation of our sovereignty. Our citizenship was in our own nations. We had a great attachment to our style of government. We wished to remain treaty Indians and reserve our ancient rights. There was no great rush among my people to go out and vote in the white man’s elections. *Anyone who did so was denied the privilege of becoming a chief or a clan mother in our nation.*”) (emphasis added)).

53. See, e.g., United States v. Kagama, 118 U.S. 375, 384 (1886) (“Because of the local ill feeling, the people of the states where [Indian tribes] are found are often their deadliest enemies.”).

vote];

- (2) Indians living on reservation lands were residents of their reservation and not of the state . . . [and therefore failed to meet residency requirements];
- (3) Indians [living on reservations were not subject to state law,] did not pay state taxes and, therefore, should not be able to affect revenue decisions; and
- (4) Indians were not “civilized,” and their continued participation in their [t]ribal communities precluded participation in other elections.⁵⁴

Proponents of tribal voting successfully challenged these restrictions in a series of state court cases,⁵⁵ clearing the first major hurdle toward increased tribal participation in non-tribal political processes at the local, state, and national levels. Later, tribes also fought successfully to place precincts on reservation lands, have translators available at polling places, and prevent gerrymandering to marginalize tribal populations.⁵⁶ Recognizing that tribal participation in tribal elections was consistently higher than tribal participation in non-tribal elections,⁵⁷ some tribes moved their election dates to coincide with

54. *Native Voters could Affect 2004 Elections*, DEMOCRATIC POLICY COMMITTEE, Oct. 7, 2004, http://democrats.senate.gov/dpc/dpc-new.cfm?doc_name=sr-108-2-283 (last visited Nov. 12, 2009); see also COHEN, *supra* note 45, at 172 (describing the definition of Indians as “wards”); MCCOOL ET AL., *supra* note 12, at 3–19; Willard Hughes Rollings, *Pursuing Equal Justice in the West: Citizenship and Suffrage: The Native American Struggle for Civil Rights in the American West, 1830–1965*, 5 NEV. L.J. 126, 135–39 (2004) (discussing states’ arguments against Indians’ right to vote: Indians could not be civilized enough, Indians lived on Indian reservations and therefore did not pay state taxes, Indians were wards of the government and therefore not competent enough to vote, and Indians were not residents of the state).

55. See, e.g., *Harrison v. Laveen*, 196 P.2d 456 (Ariz. 1948) (holding that Indians are not “under guardianship” as contemplated in Arizona Constitution and statutes, and therefore cannot be excluded from voting); *Acosta v. San Diego*, 272 P.2d 92 (Cal. Dist. Ct. App. 1954) (rejecting the argument that a reservation Indian was not a state resident and ordering the County to provide welfare benefits to plaintiff); *Montoya v. Bolack*, 372 P.2d 387 (N.M. 1962) (holding parts of the Navajo Reservation within the exterior boundaries of New Mexico were politically part of the state, and therefore, reservation residents were state residents for voting purposes); *Swift v. Leach*, 178 N.W. 437 (N.D. 1920) (holding trust-patent Indians who had become civilized and severed their tribal relations were qualified to vote); see also MCCOOL ET AL., *supra* note 12, at 48–67, 98–105, 119–129, 143–153.

56. MCCOOL ET AL., *supra* note 12, at 69, 72–86; Jackson, *supra* note 12, at 269–81; Rollings, *supra* note 54, at 139–40; Wolfley, *supra* note 12, at 195–201 (discussing gerrymandering of Indians’ votes and denial of polling places in outlying Indian communities as well as the Voting Rights Act which requires language assistance at the polls).

57. See generally John M. Glionna, *Finding a Voice in Politics*, L.A. TIMES, May 22,

non-tribal elections.

C. The Rise of Tribal Influence in Non-Tribal Politics

Three developments in the last seventy-five years stand out as the most influential in the area of tribal participation in non-tribal politics: (1) the creation of pan-tribal organizations focused on promoting comprehensive political action, including voter engagement; (2) the rise of tribal gaming enterprises; and (3) more recently, the position of tribal populations as “swing votes” in “battleground” states. Together, these developments have led to an unprecedented level of tribal political power in non-tribal politics.

The National Congress of American Indians came into existence in 1944 with the goals of coordinating tribal opposition to federal termination policies, securing native voting rights, and pressing for a commission to hear native land claims.⁵⁸ NCAI’s strategy included educating the public and elected officials about tribal issues, lobbying, litigating voting rights cases, monitoring elections, and encouraging tribal citizen voting—essentially comprehensive political participation in non-tribal politics.⁵⁹ When termination policy was abandoned, NCAI continued its effort to support tribal government and individual rights. In recent years, NCAI’s efforts to encourage tribal voting have been directed through its Native Vote Initiative⁶⁰ and appear to have experienced steady success.⁶¹

Another younger organization has followed in NCAI’s footsteps, but with a more focused mission. The Indigenous Democratic

2004, at A-1; Sarah Kershaw & Eli Sanders, *The 2004 Campaign: Voting Blocs; Politicians Go Courting on Indian Reservations*, N.Y. TIMES, Sept. 23, 2004, at A1 (discussing the increased influence of Indians’ votes).

58. See National Congress of American Indians, History, <http://www.ncai.org/History.14.0.html> (last visited Nov. 12, 2009) (discussing the NCAI’s founding in 1944 in order to respond to termination and assimilation policies forced upon tribal governments); see also COWGER, *supra* note 20, at 3, 9–10, 44, 64–65, 151–53.

59. COWGER, *supra* note 20, at 9–10, 44, 64–65, 151–54.

60. See generally National Congress of American Indian, Policy Issues, <http://www.ncai.org/Policy-Issues.6.0.html> (last visited Nov. 12, 2009) (providing a list of policy matters addressed by the NCAI); Native Vote, <http://nativevote.org/index.html> (last visited Nov. 12, 2009) (providing information on the National Congress of American Indians’ 2008 Native Vote Campaign); see also MCCOOL ET AL., *supra* note 12, at 177–79.

61. See Jodi Rave, *While Indians were Expected to go to the Polls...*, BISMARCK TRIB., Dec. 3, 2008, at B1 (stating that preliminary numbers collected by NCAI suggest strong general trend of increasing tribal voting).

Network began in early 2005 and focuses on getting tribal candidates elected to non-tribal positions, i.e. “local, state, and national” positions. The INDN pursues its mission through recruiting potential candidates, training them how to campaign, fundraising for them, advising them during their campaigns, and encouraging voter turnout on their behalf.⁶²

The seeds of influence sown by the NCAI and INDN took root in the fertile earth provided by tribal gaming enterprises. Gaming enterprises gave successful tribes the resources to fund candidates, hire lobbyists, purchase issue-based advertising in prime-time slots, and make donations that gave them access on both sides of the aisle.⁶³ This trend has continued and accelerated. A recent study conducted by the Associated Press in 2003 showed that tribes contributed about \$7 million to federal candidates, political action committees, and national parties in the 2001–2002 election cycle.⁶⁴ According to the Center for Responsive Politics, tribes donated more than \$10 million to federal candidates alone in the 2007–2008 election cycle.⁶⁵ As tribal gaming has grown, it has developed its own independent economic force in some places; employing so many non-Indians, it has become difficult to oppose without collateral economic damage to tribal and non-tribal citizens alike.⁶⁶ The federal government has effectively made further tribal engagement in state political processes a high priority for tribes with the passage of the Indian Gaming

62. See Indigenous Democratic Network, Our Mission, <http://indnslist.org/OurMission> (last visited Nov. 12, 2009) (describing the INDN’s four-pronged strategy to elect Democratic Indians and involve Indians in the political process); Indigenous Democratic Network List, Helping Indians Run, <http://indnslist.org/HelpIndiansRun> (last visited Nov. 12, 2009) (describing INDN’s assistance which includes recruitment, training, funding, and providing assistance throughout the campaign).

63. See MCCOOL ET AL., *supra* note 12, at 185–87; Dao, *supra* note 16 (discussing the political power created by Indian’s gambling profits); Wilkins, *supra* note 13, at 732–33; (discussing the use of Indian gaming finances to make significant funding contributions to American political campaigns).

64. See *Tribes can give Candidates more Cash American Indian Tribes are Exempt from the Overall Donor Limit in Federal Campaign Law*, WIS. ST. J., Mar. 18, 2003, at A1 (describing American Indian tribes’ use of their advantage in political giving; they do not have to abide by the overall individual donor limit).

65. See Center for Responsive Politics, Indian Gaming: Long-Term Contribution Trends, <http://www.opensecrets.org/industries/indus.php?cycle=2008&ind=g6550> (last visited Nov. 12, 2009).

66. See, e.g., W. DALE MASON, INDIAN GAMING: TRIBAL SOVEREIGNTY AND AMERICAN POLITICS 88, 147, 160 (2000) (referring to economic benefits such as job creation produced by casino operations as well as the conflict between Indian gaming interests and non-Indian gaming interests).

Regulatory Act and its compacting requirement.⁶⁷

With the seeds sown and the ground fertile, changes in the political climate have provided ripe conditions for those seeds to sprout. Margins of victory between the two major parties appeared to narrow from the 2000 election until the 2008 election.⁶⁸ Given that tribal populations generally strongly favor Democrats as a group,⁶⁹ they can tip elections, and while it might be hard to prove,⁷⁰ they probably have. In *Native Vote: American Indians, the Voting Rights Act, and the Right to Vote*, the authors characterize this new group of participating native peoples as a “swing-vote electorate,”⁷¹ and they are not alone.⁷² Whatever the reality is, major parties have paid more attention to tribal voting blocks in recent years than ever before based on that

67. See generally 25 U.S.C. § 2710(d)(1)(C) (2008); Kathryn R.L. Rand, *Caught In The Middle: How State Politics, State Law, and State Courts Constrain Tribal Influence over Indian Gaming*, 90 MARQ. L. REV. 971, 972, 1000 (2007) (discussing the Indian Gaming Regulatory Act and its affect on the states); see, e.g., MASON, *supra* note 66, at 59–69, 146–75 (examining legislative intent to set up a system in which state and Indian tribes communicate and the Act’s application in New Mexico state court).

68. See generally MCCOOLET AL., *supra* note 12, at 176–77 (“Efforts to mobilize Indian voters have been greatest in a few western swing states, where such voters can make the difference between defeat or victory in certain races.”); Glionna, *supra* note 57; Kershaw & Sanders, *supra* note 57 (“In the last few years, political races from Congress to county sheriff have begun to hinge on the Indian vote, particularly in places like South Dakota, where the Indian population is 8 percent [sic]. Republicans and Democrats alike, including the presidential candidates, are courting Indians as never before . . .”).

69. Open Secrets, Indian Gaming: Long-Term Contribution Trends, <http://www.opensecrets.org/industries/indus.php?cycle=2008&ind=g6550> (last visited Nov. 12, 2009).

70. It is impossible to point to a particular vote that won a particular race, even when the margin of victory is narrow.

71. MCCOOLET AL., *supra* note 12, at 176.

72. See, e.g., Anne T. Denogean, *60 Years Ago in Arizona, Indians Won Right to Vote*, TUCSON CITIZEN, July 24, 2008 (“American Indian clout in Arizona sometimes manifests as the swing vote. An exceptional Indian turnout in 2002 helped put Janet Napolitano into office as governor in a race decided by 11,819 votes.”); Denis Staunton, *Presidential Hopefuls on The Trail of Native American Vote*, IRISH TIMES, May 31, 2008, at 9; (“Indians form 10 per cent of the population of New Mexico, a key swing state . . . and they could make a difference to tight races in Colorado and Nevada—and even California . . .”); *The Race is on for Congressional District 1: Norris; Navajos are ‘Sleeping Giant’*, NAVAJO TIMES, Feb. 28, 2002, at A1; U.S. FEDERAL NEWS, *Native Americans Could Decide Race In Key States*, U.S. FED. NEWS, Nov. 3, 2008, available at 2008 WLNR 21919854 (“Congressional District 1 is in northern Arizona . . . the district has a 25 percent population of Native Americans [I]t’s a swing district.”); Jodi Rave, *The National Congress of American Indians Leading National “Election Protection” Measure*, BISMARCK TRIB., Nov. 1, 2008, at B1 (“[T]he Native vote in some districts is as high as 20 percent, allowing for enough voters to determine the final results of an election.”).

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perception.⁷³

D. Tribes' Political Harvest

Although it is difficult to establish clear causation when it comes to elections and politics, the election of tribal citizens to non-tribal political office represents strong evidence of the level of tribal influence. Today, at least thirty tribal citizens have been elected to state legislatures in the continental states,⁷⁴ many of whom represent districts that overlap with reservations.

The causal connection between tribal participation and non-tribal election results stretches a bit thinner when the candidates in question are non-tribal and the district in question is not made up primarily of tribal voters. Nonetheless, many attribute the outcome of some races featuring those candidates and districts to tribal interests. For instance, tribal citizens make up only about two percent of Washington State's population; however, tribal votes and tribal gaming revenues have been credited with providing important financial support that resulted in the defeat of U.S. Senator Slade Gordon in 2000, the 129-vote victory of Governor Christine Gregoire in 2004, and the 2006 re-election of U.S. Senator Maria Cantwell.⁷⁵ In the 2002 South Dakota U.S. Senate race, Tim Johnson trailed Republican challenger John Thune most of the night, but took the lead when the last two precincts were counted—precincts that

73. Glionna, *supra* note 57; Daniel Lathrop, *Native Americans Launch D.C. Lobbying Campaign*, THE HILL, July 15, 1998, at 9 ("The Democratic National Committee has aggressively targeted American Indians in recent years and continues to do so. The DNC has brought tribal leaders to Washington for political training, formed an advisory committee on American Indian concerns and adopted an official plank supporting tribal sovereignty."); *Rockin' Out the Native Vote—'Rez Rock the Vote' Airs on PBS*, INDIAN COUNTRY TODAY, October 6, 2004 ("[B]oth Democrats and Republicans are vying for the Native vote. President Bush met with tribal leaders and veterans during the opening of the National Museum of the American Indian and reaffirmed tribal sovereignty. The Democratic National Committee in Washington, D.C. is now preparing American Indian field directors and hosting the first ever Native American Field Training Program. . . . New Native American Field Directors are being deployed to battleground states with significant Native American populations including Arizona, New Mexico, Washington, Colorado, Nevada, Oregon, Michigan, Wisconsin, Florida and Minnesota.").

74. This figure excludes representatives from Alaska and Hawaii. Adding these states, the total rises to 35. *See supra* note 22.

75. Amy Argetsinger, *Judge Upholds Win For Wash. Governor*, WASH. POST, June 7, 2005, at A04; Lynda V. Mapes, *More Natives Step Into Legislature*, SEATTLE TIMES, Jan. 9, 2007.

covered most of the Pine Ridge Indian Reservation.⁷⁶

E. Missing Context

Many people, tribal and non-tribal, have celebrated the ability of reservation citizens to vote in state, and thereby national, elections.⁷⁷ They have rejoiced in their ability to defeat anti-tribal legislation and officials. Unfortunately, this joy overshadowed the fact that the right of reservation citizens to vote in non-tribal elections started out as the capstone of a federal policy designed to destroy tribal sovereignty.

1. The Means and Ends of the "Allotment and Assimilation" and "Termination" Policies

The federal government's "Indian" policy has, by and large, focused on "getting rid" of the "Indian problem."⁷⁸ "Indians" represented a "problem" for Americans primarily for four reasons. First, they lived on land desired by non-tribal people.⁷⁹ Settlers wanted land for homesteads, farms, and ranches.⁸⁰ Businesses wanted to profit from the available natural resources, including gold, or the right to lay train tracks through reservations.⁸¹ In the eyes of surrounding non-tribal communities, tribes failed to put the land to good use in many instances, and therefore did not need it, or worse,

76. MICHAEL BARONE ET AL., *THE ALMANAC OF AMERICAN POLITICS* 1468 (2004).

77. *Accord Arizona Natives to Celebrate Native American Right to Vote Day*, REZNET, July 11, 2008, <http://www.reznetnews.org/blogs/tribalog/arizona-natives-celebrate-native-american-right-vote-day-16590#> (last visited Nov. 12, 2009); *Navaho Woman Awarded for Contesting Prop. 200 Law*, NATIVE AM. TIMES, July 25, 2008, at 2, available at 2008 WLNR 16422348.

78. CALLOWAY, *supra* note 15, at 404.

79. CALLOWAY, *supra* note 15, at 218–43, 290–316, 372–403; Merrill E. Gates, *Land and Law as Agents in Educating Indians*, in SEVENTEENTH ANNUAL REPORT OF THE BOARD OF INDIAN COMMISSIONERS 17–19, 26–35 (1885) and reprinted in *AMERICANIZING THE AMERICAN INDIANS: WRITINGS BY THE "FRIENDS OF THE INDIAN" 1880–1900*, at 47–48 (Francis Paul Prucha ed., 1973) ("The great mass of our legislation regarding Indians has had to do with getting land we had promised them into our possession by the promise of a price as low as we could fix and yet keep them from making border warfare upon us . . .").

80. CALLOWAY, *supra* note 15, at 218–43, 290–316, 372–403.

81. *Id.*; Porter, *The Demise*, *supra* note 13, at 114 ("Congress was under considerable pressure from two competing interests to resolve this question in favor of ending a separatist approach. The railroads and other business interests were eager to appropriate the remaining Indian lands to promote further Westward expansion. These were extremely powerful forces that were offset and tempered only by the intensity and commitment of the social reformers bent on "helping" the Indians through the perpetuation of their Indian civilization efforts.").

were not worthy of it because they were guilty of the moral sin of sloth.⁸² State governments viewed these lands as “lost” tax revenues⁸³ and areas of “lawlessness” interrupting their otherwise lawful domination, providing a safe haven for those seeking to evade state law.⁸⁴

Second, tribes were a problem because they could resist efforts to take territory by force until at least the late 1800s. Tribes did not always win open conflicts, but up to the turn of the nineteenth century they could make military conflict financially, strategically, or politically prohibitive.⁸⁵ They could also tip the balance in conflicts between other sovereign forces.⁸⁶ The allegiance of tribal forces, therefore, played a major role in American policy from the Revolution through the Civil War for these reasons.⁸⁷

Third, tribes were a problem because by the time they lost the ability to mount substantial armed resistance, sufficient numbers of religious or otherwise humanitarian non-tribal groups were pushing for “civilization” of the tribes, based on a moral obligation to honor governmental agreements and a sense of “*noblesse oblige*.”⁸⁸ The influence of these groups made open extermination not viable politically, although some considered genocide a legitimate option.⁸⁹

82. 18 Cong. Rec. 190 (1886) (statement of Rep. Skinner); AMERICANIZING THE AMERICAN INDIANS, *supra* note 79, at 47–48 (“We have held [the Indians] at arm’s length, cut them off from the teaching power of good example, and given them rations and food to hold them in habits of abject laziness.”); CALLOWAY, *supra* note 15, at 230 (stating that non-Indians rationalized taking Indian land because “Indians did not put the land to good use . . . and could not be allowed to deny that land to American farmers.”); Porter, *The Demise*, *supra* note 13, at 112–19.

83. See *infra* note 275.

84. Carole Goldberg-Ambrose, *Public Law 280 and the Problem of Lawlessness in California Indian Country*, 44 UCLA L. Rev. 1405, 1409–15 (1997) (describing how 19th and 20th century impressions of Indian Country as “lawless” related to the introduction and passage of Public Law 280).

85. CALLOWAY, *supra* note 15, at 162–80, 218–43, 290–316.

86. See *generally id.* (describing tribal involvement in American wars through the nineteenth century).

87. See *generally id.*

88. See *id.* at 404–10; Gates, *supra* note 79, at 46–49 (arguing that considerations of *noblesse oblige* should urge the United States to “save the Indian from himself” through promotion of civilization, Christianity, and citizenship); Porter, *The Demise*, *supra* note 13, at 114–15 (discussing the influence of the Indian Rights Association in promoting efforts at civilization).

89. MCCOOL ET AL., *supra* note 12, at 5 (“One approach was basically genocide, replete with statements that all Indians should be exterminated forthwith, or, in Senator Doolittle’s quaint phrase quoted earlier, ‘put . . . out of the way.’ Colonel George Armstrong Custer clearly demonstrated this objective when he slaughtered a Cheyenne village on the Washita River in 1868—the year the Fourteenth Amendment was ratified. A Nebraska newspaper at that time editorialized: ‘Exterminate the

Last, tribes were a problem because the material support provided to “Indians” by the federal government cost a great deal of money for which the people providing that support thought they received little or no benefit.⁹⁰

Consequently, any comprehensive solution to the “Indian problem” had to do four things: (1) siphon tribal land and resources out of tribal control and into non-tribal hands; (2) not rely primarily on the use of military force, which meant using diplomacy, law, or both; (3) give jurisdiction over tribal lands to state governments; and (4) relieve the federal government of its obligation of support and supervision.

From 1871 to 1934, the federal government thought the answer was “allotment and assimilation.”⁹¹ The main goal of this policy was the “absor[ption of tribes] into the mainstream of American life,” and the destruction of “the ‘savagery’ of tribal autonomy.”⁹² Tribal peoples were to “participate fully in the American system” to “end the tribe as a separate political and cultural unit,” and to “have exactly the same law appl[y] to [them] as applied to whites.”⁹³ Part and parcel of the assimilation end game was to confer U.S. citizenship on tribal citizens.⁹⁴

Congress passed three main pieces of legislation to accomplish this task—the 1887 General Allotment Act⁹⁵ (GAA), the 1924 Indian Citizenship Act,⁹⁶ and the 1885 Major Crimes Act.⁹⁷ The GAA aimed to break up tribal territories. It gave the President discretion to divide

whole fraternity of redskins.”); RENNARD STRICKLAND, *THE INDIANS IN OKLAHOMA* 38 (H. Wayne Morgan et al. ed., Univ. of Okla. Press 1980) (quoting Commissioner of Indian Affairs Hiram Price, “[O]ne of two things must eventually take place, to wit, either civilization or extermination of the Indian.”).

90. See LORING BENSON PRIEST, *UNCLE SAM’S STEPCHILDREN: THE REFORMATION OF UNITED STATES INDIAN POLICY, 1865–1887*, AT 107–108 (Bison Book 1975) (1942) (discussing Congress’s growing reluctance to provide annuities, seeing them only as charity as excess tribal lands were absorbed by the government).

91. ROBERT CLINTON ET AL., *AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM* 30–36 (LexisNexis, 5th ed. 2007); cf. COHEN, *supra* note 45, at 75–84 (describing the shortcomings of “Allotment and Assimilation 1871-1928”).

92. COHEN, *supra* note 45, at 77.

93. *Id.* at 77, 81.

94. *Id.* at 899 (“It became a major goal of the assimilation process to make Indians citizens of the United States. This was especially true with the allotment policy.”).

95. Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (repealed 2000).

96. Act of June 2, 1924, ch. 233, 43 Stat. 253 (1924) (codified as amended at 8 U.S.C. § 1401(b) (1994)).

97. Act of Mar. 3, 1885, ch. 341, 23 Stat. 362, 385 (1885) (codified as amended at 18 U.S.C. §1153 (2006)).

up any reservation he thought “advantageous for agricultural or grazing purposes” into parcels of pre-determined size, called allotments.⁹⁸ Once selected, the reservation was surveyed and a census of tribal citizens made. Tribal citizens then had the opportunity to select allotments.⁹⁹ Some tribal citizens did not select allotments; a federal agent assigned allotments to these tribal citizens.¹⁰⁰ If “surplus” lands existed after all allotments were made, the federal government could sell such land to settlers.¹⁰¹ Initially, the consent of the tribe whose land was to be allotted had to be obtained before any “surplus” lands could be sold;¹⁰² however, the U.S. Supreme Court’s decision in *Lone Wolf v. Hitchcock* undid the consent requirement.¹⁰³

Allotted lands were generally held in trust for twenty-five years, during which time they could not be alienated or encumbered.¹⁰⁴ The idea was that during the trust period tribal members would be educated, Christianized, forced to adopt non-tribal culture, and forced to abandon “heathen” culture.¹⁰⁵ The trust period could be cut short by the Commissioner of Indian Affairs if the allottee proved to be sufficiently “competent” to manage his or her affairs,¹⁰⁶ although proof of competency usually bore more relation to rationalizing the transfer of land out of Indian hands than genuinely giving Indians control of their own affairs.¹⁰⁷ At the end of the trust period, the allottee was granted a fee patent entitling the allottee to alienate the land and making the land subject to state criminal and civil jurisdiction, including property taxation.¹⁰⁸ Upon receiving the fee patent, the allottee also became a U.S. citizen.¹⁰⁹

The Indian Citizenship Act¹¹⁰ sought to break up tribal governments by compromising the foundation of all governments—their

98. See *Beck v. Flournoy Live-Stock & Real-Estate Co.*, 65 F. 30, 33 (8th Cir. 1894) (internal quotations omitted) (referring to section 1 of the Act of Feb. 8, 1887).

99. See *id.* (referring to section 2 of the Act of Feb. 8, 1887).

100. See *id.* (referring to section 3 of the Act of Feb. 8, 1887).

101. 25 U.S.C. § 348 (2006).

102. Act of Feb. 8, 1887, ch. 119, § 5, 24 Stat. 388 (repealed 2000).

103. 187 U.S. 553, 568 (1903).

104. General Allotment Act, ch. 119, § 5, 24 Stat. 388 (1887).

105. Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J., 1, 10–12 (1995).

106. Burke Act of 1906, 34 Stat. 182 (amending § 6 of the General Allotment Act) (codified at 25 U.S.C. § 349).

107. See Royster, *supra* note 105, at 10–12.

108. Burke Act of 1906, 34 Stat. 182.

109. *Id.*

110. Ch. 233, 43 Stat. 253 (1924) (codified as amended at 8 U.S.C. § 1401(b)).

citizenry.¹¹¹ Although the U.S. Supreme Court baldly stated that dual tribal-federal citizenship under the GAA during the trust period was not incompatible,¹¹² it clearly stated that the GAA's ultimate goal when all land had been allotted and all trust periods expired was to dissolve tribal governments, terminate the federal guardianship, and extend state law over the allottees.¹¹³ The 1924 Citizenship Act unilaterally admitted tribal citizens to U.S. citizenship regardless of whether they consented to being citizens.¹¹⁴ The act declared that it "shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property."¹¹⁵ However, if *expressio unius est exclusio alterius*, the statute left open the possibility that such dual citizenship might "impair or otherwise affect" other rights, including sovereign rights.¹¹⁶ If there were no conflict with regard to dual citizenship, the language regarding property should not have been necessary.

The Major Crimes Act¹¹⁷ undermined tribes by replacing tribal law, processes, and authority with non-tribal ones in a primarily governmental and culturally crucial area—criminal justice.¹¹⁸ The Act extended federal jurisdiction and non-tribal concepts of criminal justice over tribes and reservations land. The Act authorized the federal enforcement of seven specific crimes committed against the person or property of an "Indian or other person."¹¹⁹ The Act represented the first extension of non-tribal jurisdiction over exclusively tribal affairs.¹²⁰ Prior statutes and agreements only governed offenses when non-tribal individuals or property were involved.¹²¹ Other programs begun by the Indian Service during this period also sought to destroy tribal culture and autonomy, including Indian Police, the Courts of Indian Offenses, and Indian Boarding

111. *Id.* Many tribal citizens were granted U.S. citizenship by the GAA, earlier agreements, and other legislation. *See supra* note 41. "Many [of these] efforts were designed to make tribal memberships and United States citizenship mutually exclusive." COHEN, *supra* note 45, at 83.

112. *United States v. Nice*, 241 U.S. 591, 598 (1916).

113. *See id.* at 596–97.

114. *See supra* note 42.

115. Ch. 233, 43 Stat. 253 (1924) (codified as amended at 8 U.S.C. § 1401(b)).

116. *Id.*

117. Ch. 341, 23 Stat. 362, 385 (1885) (codified as amended at 18 U.S.C. § 1153).

118. The Act was a direct result of the U.S. Supreme Court's decision in *Ex parte Crow Dog*, 109 U.S. 556 (1883).

119. Major Crimes Act, ch. 341, 23 Stat. at 385.

120. Royster, *supra* note 105, at 43–44.

121. *Id.* at 44.

Schools.¹²²

After a brief period of affirmation of tribal governments,¹²³ the federal government pursued a new answer to the “Indian problem” from 1943 to 1962—a policy of “termination.”¹²⁴ This policy period had goals identical to those of the allotment and assimilation period,¹²⁵ but used a more accelerated time line and slightly different means. Once again the ultimate goal was to “as rapidly as possible . . . make the Indians . . . subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens [and] to end their status as wards . . . and to grant them all of the rights and prerogatives pertaining to American citizenship.”¹²⁶ Another goal of termination policy was for “all of the Indian tribes and the individual members . . . [to] be freed from Federal supervision and control and from all disabilities and limitations specially applicable to Indians” as soon as possible,¹²⁷ “end[ing] most aspects of the historic relationships between the federal government and [any terminated] tribes, transferring responsibility for those tribes to states.”¹²⁸

Legislation pursuing the termination policy mainly took two forms—acts “terminating” specific tribes and acts extending state jurisdiction over reservations. An act terminating a tribe would generally set a deadline for termination of two to five years.¹²⁹ During that time, final rolls would be prepared and the tribal property would be distributed.¹³⁰ Ultimately, federal education, health, welfare, and housing assistance ended, and state legislative and judicial jurisdiction was imposed, including state taxation authority. Federal and tribal laws no longer applied.¹³¹

The federal government also extended state jurisdiction over

122. See CLINTON ET AL., *supra* note 91, at 35–36.

123. COHEN, *supra* note 45, at 84–89 (generally referred to as “Indian Reorganization” policy period, roughly 1928–1942).

124. CLINTON ET AL., *supra* note 91, at 39–41; Cf. COHEN, *supra* note 45, at 89–97 (“Termination 1943–1961”).

125. COHEN, *supra* note 45, at 90 (“[This period] turned Native American policy back onto itself, reflecting the practices and philosophy of the earlier era of allotment and assimilation.”).

126. H.R. CON. RES. 108, 83d Cong., 67 Stat. B132 (1953); COHEN, *supra* note 45, at 94.

127. H.R. CON. RES. 108, 83d Cong., 67 Stat. B132 (1953).

128. COHEN, *supra* note 45, at 94–95.

129. *Id.* at 95.

130. *Id.*

131. *Id.*

reservations by means of Public Law 280.¹³² This law unilaterally transferred civil and criminal jurisdiction over almost all reservations within five states to the governments of those states.¹³³ The law envisioned similar transfers in each of the remaining states so long as the voters of each state consented to assume it. “The alleged justification was a lawlessness that amounted to the complete breakdown of law and order on Indian reservations because of the inadequacy of tribal law enforcement and institutions.”¹³⁴ In 1968, Congress required tribal consent to extend state jurisdiction under Public Law 280; however, nine additional states had already assumed full or partial jurisdiction by that time.¹³⁵

2. *Lining Up the Timeline: Federal Policy and Tribal Citizen Voting in Non-Tribal Elections*

Viewed in isolation, it comes as no surprise that conflicts over Indian voting occurred during a policy period in which Congress passed legislation conferring citizenship on large numbers of Indians. However, when placed in a broader historical context, the connection between these challenges and federal efforts to eliminate tribal sovereignty become clearer. Numerous tribal citizens had been granted federal citizenship prior to the GAA.¹³⁶ Despite this, few cases,

132. Pub. L. No. 83-280, Ch. 505, 67 Stat. 588 (1953) (section 7 repealed and reenacted as amended 1968) (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-1326, 28 U.S.C. § 1360, 1360 note); COHEN, *supra* note 45, at 96, 544-65.

133. Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin were the original “mandatory” states. Pub. L. No. 83-280, Ch. 505, 67 Stat. 588 (1953). The Confederated Tribes of the Warm Springs Reservation in Oregon and the Red Lake Band of Chippewa Indians Minnesota were specifically excluded from Public Law 280 jurisdiction. COHEN, *supra* note 45, at 96, 544-65.

134. COHEN, *supra* note 45, at 96.

135. Indian Civil Rights Act, 82 Stat. 78 (codified as amended at 25 U.S.C. §§ 1321-1326 (1968)); COHEN, *supra* note 45, at 96-97.

136. *Elk v. Wilkins*, 112 U.S. 94, 100 (1884):

[Indians] were never deemed citizens of the United States, except under explicit provisions of treaty or statute to that effect, either declaring a certain tribe, or such members of it as chose to remain behind on the removal of the tribe westward, to be citizens, or authorizing individuals of particular tribes to become citizens on application to a court of the United States for naturalization, and satisfactory proof of fitness for civilized life; for examples of which see treaties in 1817 and 1835 with the Cherokees, and in 1820, 1825, and 1830 with the Choctaws, 7 Stat. 159, 211, 236, 335, 483, 488; *Wilson v. Wall*, 6 Wall. 83; Opinion of Attorney-General Taney, 2 Opinion of Attorneys General 462; in 1855 with the Wyandotts, 10 St. 1159; *Karrahoo v. Adams*, 1 Dillon 344, 346; *Gray v. Coffman*, 3 Dillon 393; *Hicks v. Buttrick*, 3 Dillon 413; in 1861 and in March, 1866, with the Pottawatomies, 12 Stat.

if any, involving state or territorial voting rights for reservation citizens exist prior to the start of the Allotment and Assimilation Period in 1871. It was only when the federal government began pushing the extension of citizenship and state political rights to tribal citizens as part of its plan to eliminate tribes that these challenges began in earnest and, more importantly, began to succeed.

Many states voluntarily amended their voter requirements during the termination period to allow Indians to vote without the need for litigation.¹³⁷ Other states continued to resist the effort to extend state political rights to tribal citizens, making court challenges necessary. The major cases first successfully contesting the categorical exclusion of reservation citizens from voting were all decided during either the allotment and assimilation period (1871 to 1934),¹³⁸ or the termination policy period (1943 to 1962).¹³⁹ *State ex rel. Crawford v. Norris* (decided in 1893),¹⁴⁰ *Swift v. Leach* (decided in 1920),¹⁴¹ *Trujillo v.*

1192; 14 Stat. 763; in 1862 with the Ottawas, 12 Stat. 1237; and the Kickapoos, 13 Stat. 624; and acts of Congress of March 3, 1839, ch. 83, § 7, concerning the Brothertown Indians, and of March 3, 1843, ch. 101, § 7, August 6, 1846, ch. 88, and March 3, 1865, ch. 127, § 4, concerning the Stockbridge Indians, 5 Stat. 351, 647; 9 Stat. 55; 13 Stat. 562. See also treaties with the Stockbridge Indians in 1848 and 1856, 9 Stat. 955; 11 Stat. 667; 7 Opinions of Attorneys General, 746.

See also *supra* note 37.

137. In 1950, seven years after the federal government adopted termination as its policy, Idaho repealed a constitutional provision prohibiting voting by "Indians not taxed, who have not severed their tribal relations and adopted the habits of civilization." Bethany R. Berger, *Red: Racism and the American Indian*, 56 UCLAL. REV. 591, 645-46 (2009) (citing PAULI MURRAY, STATES' LAWS ON RACE AND COLOR 118 (Univ. of Ga. Press 1997)). In 1951, South Dakota rescinded its statute stating that Indians "maintaining tribal relations . . . cannot vote or hold office." *Id.* Maine amended its constitution in 1954 to remove the "Indians not taxed" exclusion from its voting requirements. TAYLOR, *supra* note 13, at 91. Utah removed language from its statutes in 1957 declaring reservation residents were not residents of the state for purposes of voting. MCCOOLE ET AL., *supra* note 12, at 96-97. In 1960, two years before the federal government abandoned termination as a policy, Minnesota amended its constitution to remove a provision restricting Indian voting to "[p]ersons of mixed white and Indian blood who have adopted the customs and habits of civilization and [p]ersons of Indian blood . . . who have adopted the language, customs and habits of civilization, after an examination before any district court of the State." Berger, *supra*, (citing MURRAY, *supra*).

138. See CLINTON ET AL., *supra* note 91.

139. *Id.*

140. 55 N.W. 1086 (Neb. 1893) (holding that Indians who had received allotments under the GAA were qualified to vote and votes cast in precincts located on Indian reservations were valid).

141. 178 N.W. 437 (N.D. 1920) (holding that sufficient evidence had been presented to support the finding that trust patent Indians were civilized and had

Garley (decided in 1948),¹⁴² *Harrison v. Laveen* (decided in 1948),¹⁴³ *Acosta v. San Diego County* (decided in 1954),¹⁴⁴ and *Montoya v. Bolack* (decided in 1962)¹⁴⁵ represent the vanguard of these cases.

F. *Misplaced Battles and Missed Opportunities*

Many people justifiably excoriate the defendants in the cases just mentioned as racists. Evidence of bigotry appears at almost every turn. Sadly, the motivations behind the defendants' arguments have overshadowed the most interesting and potentially beneficial part of these cases—the arguments themselves. Regardless of motivation, states defending the exclusion of reservation residents from voting in state elections made many arguments tribes can only dream about states making today, specifically, that reservations were, politically and territorially, entirely separate from the state.

Tribes¹⁴⁶ and tribal citizens reacted strangely to this new state po-

severed their tribal relations so that they met state voter qualifications).

142. MCCOOL ET AL., *supra* note 12, at 11–13. A New Mexico trial court decided *Trujillo* in 1948. In *Trujillo*, a World War II veteran returned from the war to live on his reservation and tried to register to vote in a state election. *Id.* at 13. He was told he could not register because he was not a state resident and was an “Indian not taxed.” *Id.* A three-judge panel held for Mr. Trujillo. *Id.* The court first concluded that he was a state resident. The court went on to write:

We are unable to escape the conclusion that, under the Fourteenth and Fifteenth Amendments, that constitutes a discrimination on the ground of race. Any other citizen, regardless of race, in the State of New Mexico who has not paid one cent of tax of any kind or character, if he possesses the other qualification, may vote.

Id. The decision went unappealed and unreported, but resulted in a permanent injunction against enforcing the “Indians not taxed” provision of the New Mexico Constitution. *Id.* The New Mexico Supreme Court later referenced *Trujillo* in the process of deciding *Montoya v. Bolack*, holding that Indians living on the Navaho Reservation met state residency requirements because the reservation was part of the state. *Montoya v. Bolack*, 372 P.2d 387, 390 (N.M. 1962).

143. 196 P.2d 456 (Ariz. 1948) (stating that the Indians' relationship with the federal government “resembles” that of a ward to its guardian but Indians are not “under guardianship” as contemplated in Arizona Constitution and statutes).

144. 272 P.2d 92 (Cal. Dist. Ct. App. 1954) (holding that a residence on reservation constitutes residence in the state entitling plaintiff to welfare benefits).

145. 372 P.2d 387 (N.M. 1962) (holding that those parts of the Navajo Reservation within the exterior boundaries of New Mexico were politically part of the state, and therefore, reservation residents were state residents for voting purposes).

146. Tribes did not usually appear in these cases, but even when they did not, in most instances pan-tribal political action groups, like NCAI, or other legitimately or ostensibly pro-Indian organizations, supported and guided the litigation. Even in the absence of such pan-tribal involvement, it is unlikely the tribe was unaware of the case.

sition. They had historically sought to secure guarantees of autonomy, almost without exception by treaty, even though the federal government broke those promises with the exact same frequency. They had filed law suits opposing exertions of state authority on reservations, pursuing tribal rights all the way to the U.S. Supreme Court, although they generally had lost ground. Then, when states started making arguments in the Indian voting cases congruent with tribes' historic position, *tribes and their citizens suddenly switched sides and opposed those arguments* in order to secure voting rights for reservation citizens.

Porter v. Hall,¹⁴⁷ the Arizona case overruled by *Harrison v. Laveen*, presents a prime example of states making arguments congruent with tribal sovereignty. In *Porter*, two Pima tribal citizens sought a writ of mandamus requiring the county recorder to register them to vote. The Arizona Attorney General's Office represented the recorder.¹⁴⁸ Admitting that the recorder refused to register the plaintiffs, the state argued

[t]hat the plaintiffs . . . are members of the Pima Tribe of Indians, . . . residents of the Gila River Indian Reservation and have never had . . . any residence other than upon . . . the reservation, and have no property except on said reservation, and that the plaintiffs . . . were . . . and are now subject to all the rules and regulations and laws of the United States enacted for the control and regulation of Indian reservations and Indian tribes. . . . *That said . . . reservation, the plaintiffs herein, and their property are . . . exclusively subject to and under the jurisdiction of the laws and courts of the United States and the tribal customs of said Pima Tribe, and are not subject to the laws or within the jurisdiction of the state of Arizona.* That said . . . reservation while within the geographical boundaries of . . . Arizona *is not subject to the laws of the state of Arizona, and is, therefore, not a part of the state of Arizona, either politically or governmentally*, . . . and that, therefore, plaintiffs are not residents of the state of Arizona within the meaning of . . . the Constitution of the State of Arizona.¹⁴⁹

Arizona's presentation of this as its official position in a case argued before its supreme court is nothing short of astounding. Arizona could have argued it had authority over the reservation, despite

147. 271 P. 411, 412 (Ariz. 1928), overruled by *Harrison*, 196 P.2d at 457.

148. 271 P. at 412.

149. *Id.* at 412–13 (emphasis added).

language in its Enabling Act, but it chose not to.¹⁵⁰ This choice stands in stark contrast to the history of Indian law generally, which, among other things, chronicles efforts by states to assume jurisdictional control over tribal lands and subjugate tribal peoples.¹⁵¹ A ruling in the state's favor at the supreme court level adopting the state's reasoning could have had substantial ripple effects. Had the Arizona Supreme Court agreed that the state had no claim to govern reservation lands, and that the reservation did not form part of the state, the resulting decision would have bound the state to that position. Given that a state's jurisdiction cannot extend beyond its own territory, such a holding would have seriously called into question, if not outright overruled, all present and future exertions of state authority within reservation borders—from regulation of hunting and fishing, to zoning, to taxation.

The plaintiffs' response was equally astonishing, although in a disturbing way. According to the court, the plaintiffs essentially denied their tribe had any sovereign character whatsoever, and was simply a group of people with a common race:

Plaintiffs replied, *admitting their race* and residence as alleged in the answer, and that they were under the control of the laws and rules of the United States governing Indian reservations, *but denying that they were subject to any Indian tribal customs, or that the reservation was not subject to the laws of Arizona*, and alleging that the United States exercises no jurisdiction or control over them or their property, except over certain property held in trust for them.¹⁵²

Interestingly, the *Porter* court found a way not to agree with either side completely. It held that reservations were politically part of the state, but that Indians were not competent to be voters because they were “under guardianship,” equating Indians with people “*non compos*

150. Arizona's Enabling Act disclaimed “all right” to lands “held by . . . Indian tribes.” *Id.* at 414. However, the U.S. Supreme Court had essentially ruled that such disclaimers did not operate to exclude state authority in *Draper v. United States*, 164 U.S. 240 (1896) (citing *United States v. McBratney*, 104 U.S. 621 (1881)). The *Porter* opinion ultimately relied on this reasoning. *Porter*, 271 P. at 414–16.

151. The focus of “Indian law” from a non-tribal prospective has always been to transfer tribal lands into non-tribal hands. CALLOWAY, *supra* note 15, at 236 (“Alexis de Tocqueville, a French visitor to the United States, observed the removal process and concluded that, whereas the Spaniards had earned a reputation for brutality in their dispossession of the Indians, the Americans had attained the same objective under the pretense of legality and philanthropy.”). See also *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831).

152. *Porter*, 271 P. at 413 (emphasis added).

mentis.” In the process of this rather offensive ruling, the court did draw in part on basic American civics:

The theory on which democracy is founded is that every person who is bound to obey the laws should participate in making them, and, conversely, that every one who participates in making the laws should be subject to their jurisdiction. . . . It is almost unheard [sic] of in a democracy that those who make the laws need not obey them.¹⁵³

The *Porter* court went on, quoting a similar Minnesota case, *Opsahl v. Johnson*.¹⁵⁴ The contestant in *Opsahl* challenged the results of a state election on the basis that citizen-residents of the Red Lake Reservation had inappropriately voted in the election. Finding for the contestant, the *Porter* court wrote:

[T]here are . . . cogent reasons urged by contestant against holding mixed bloods living on Indian reservations entitled to vote. The exercise of the elective franchise is participation in government and in the making of the laws to which all the inhabitants of a nation, state, or municipality must yield obedience. It cannot for a moment be considered that the framers of the Constitution intended to grant the right of suffrage to persons who were under no obligation to obey the laws enacted as a result of such grant. Or, in other words, that those who do not come within the operation of the laws of the state, nevertheless shall have the power to make and impose laws upon others. The idea is repugnant to our form of government. No one should participate in the making of laws which he need not obey.¹⁵⁵

The *Opsahl* court also analogized Indian voting to the Colonial troubles with Britain, describing it as “another phase of the wrong done in the taxation of the Colonies.”¹⁵⁶ The *Opsahl* court ultimately concluded:

[T]ribal Indians have not adopted the customs and habits of civilization, within the purview of the elective franchise provisions of our Constitution, until they have adopted that custom and habit which all other inhabitants must needs adopt when they come into the state, namely that of yielding obedience and submission to its laws.¹⁵⁷

153. *Id.* at 416.

154. *Id.* (citing *Opsahl v. Johnson*, 138 Minn. 42, 48, 163 N.W. 988, 990 (1917)).

155. *Id.* (internal quotation marks omitted).

156. *Opsahl*, 138 Minn. at 50, 163 N.W. at 991.

157. *Id.*

Non-tribal governments disclaimed jurisdiction over tribal territory in other cases as well, and based those disclaimers in part on fundamental American democratic theory.¹⁵⁸ Some courts explicitly rejected the proposition that Indians were categorically unable to vote, but conditioned the ability to vote on a change in citizenship, implicitly recognizing tribes as discrete, separate governments¹⁵⁹ in the same manner as *Elk v. Wilkins*. The *Opsahl* court essentially interpreted language associated with assimilation — “adopt[] the customs and habits of civilization”¹⁶⁰ — to mean Indians had to be similarly situated to non-Indian state citizens in relation to the body politic before they participated in the body politic with non-Indian citizens—a fundamental fairness argument.¹⁶¹ *Opsahl* was not the only case to do this.¹⁶²

158. See, e.g., *Acosta v. San Diego County*, 272 P.2d 92, 93–94 (Cal. Dist. Ct. App. 1954) (“[D]efendant contends that reservation Indians are not residents of the county for the purpose of obtaining [emergency welfare] relief.”).

159. See, e.g., *Montoya v. Bolack*, 372 P.2d 387, 394 (N.M. 1962) (“We are convinced that, for voting purposes, there is nothing in our constitution or in the statutes which prohibits an Indian from voting in a proper election, provided he fulfills the statutory requirements required of any other voter.”).

160. *Opsahl*, 138 Minn. at 45, 163 N.W. at 989.

161. *Opsahl*, 138 Minn. at 50–51, 163 N.W. at 991 (“We reach the conclusion that tribal Indians have not adopted the customs and habits of civilization, within the purview of the elective franchise provisions of our Constitution, until they have adopted that custom and habit which all other inhabitants must needs adopt when they come into the state, namely that of yielding obedience and submission to its laws. No doubt the right of suffrage was by this state held out as an inducement to the Indians to sever their tribal relations and adopt in all respects the habits and customs of civilization, and that means a taking up to the burdens which the laws of the state place upon all its inhabitants alike. This the Indian may do by taking up his abode outside the reservation and there pursuing the customs and habits of civilization.”).

162. See, e.g., *Porter v. Hall*, 271 P. 411, 419 (Ariz. 1928) (“Whenever [the federal] government shall determine in regard to any Indian or class of Indians that they are [released from guardianship and placed in the ranks of citizens of the United States and of the state of their residence], and that their status in regard to the responsibilities of citizenship is the same as that of any other citizen, the law of this state considers them no longer ‘persons under guardianship’ . . . and they will be entitled to vote on the same terms as all other citizens. But so long as the federal government insists that, notwithstanding their citizenship, their responsibility under our law differs from that of the ordinary citizen, and that they are, or may be, regulated by that government, by virtue of its guardianship, in any manner different from that which may be used in the regulation of white citizens, they are, within the meaning of our constitutional provision, ‘persons under guardianship,’ and not entitled to vote.”); *Allen v. Merrell*, 305 P.2d 490, 495 (Utah 1956) (“There is nothing in the statute which prevents an Indian from becoming qualified to vote the same way as any other citizen. All he has to do is to establish a residence in a part of the county where . . . he assumes his responsibilities as a citizen by living on lands where he pays taxes, either directly or through his rent, and otherwise removes the detachment and lack

One is left to wonder why the plaintiff-side interests involved in these cases—individual, tribal, pan-tribal, and non-Indian pro-tribal—did not see the advantages of abstaining from participation in state voting, and concomitantly, how problematic seeking state voting rights was, especially in light of the position states had taken. Seeking the right to vote meant agreeing that reservations were politically part of surrounding states. If reservation territory equated to state territory, states could more legitimately assert authority there. It was an “either/or” proposition if a coherent, normative paradigm based on commonly accepted democratic theory was anything but abandoned. Either reservations were part of states, and reservation residents therefore state residents entitled to vote in state elections, *or* the reservations were not part of states, and reservation citizens belonged to separate territorial governments and had no voting rights in state elections. The former meant states could exercise jurisdiction within the reservation; the latter meant they could not. Any arrangement where state and tribal governments co-exist raises the specter of multiple sovereignty, an inherent fallacy according to American governmental theory.¹⁶³ Courts have asserted that federal, state, and tribal citizenship are not incompatible.¹⁶⁴ Unfortunately, stating something—verbally or in a court opinion—does not make it so.

More importantly, these cases represented an opportunity to show states and tribes that avoiding overlapping sovereignty was in each government’s best interest. States could avoid being controlled by electorates not subject to their laws or obligated to provide the means to support government programs. Conversely, tribes could avoid being subjected to state authority, and thereby be more autonomous. In other words, states could not deny suffrage while asserting jurisdiction, and tribes could not demand suffrage while objecting to jurisdiction.

It is important to note that a person with tribal ancestry is not necessarily politically “Indian.” Such a person is genetically Indian, might be culturally “Indian,” and might even be entitled to tribal citizenship, but until enrollment, he or she forms no part of the tribal

of interest in the affairs of the state which surrounds him on the reservation.”).

163. The problems implicit in dual sovereignty will be addressed *infra*, Parts III–IV.

164. See, e.g., *Halbert v. United States*, 283 U.S. 753, 763 (1931) (“[T]here is no incompatibility between tribal membership and United States citizenship.”); *United States v. Nice*, 241 U.S. 591, 598 (1916) (“Citizenship is not incompatible with tribal existence.”).

body politic. A person merely ancestrally or culturally “Indian” who lives off-reservation deserves all the civil rights protections state and federal citizenship afford, including protection from racial discrimination in voting. On the other hand, individuals that are politically “Indian”—i.e. enrolled tribal “members”—are citizens of another sovereign. So long as that citizenship is kept separate, excluding tribal citizens from voting in state elections is as legitimate as Texans preventing citizens of Massachusetts from influencing the formation of Texas law by voting in Texas elections, and vice versa. Trying to claim sovereign independence as a citizen of one government, while asserting civil rights protections under another government, represents a conflicted paradigm, absent some form of limitation on authority similar to the Tenth Amendment.

III. CONSENT OF THE GOVERNED, CONSENT BY PARTICIPATION, THE HUMAN TENDENCY TO SEEK POWER, AND *IMPERIUM IN IMPERIO*: AMERICAN GOVERNMENTAL AXIOMS

The fundamental tensions in federal law concerning tribes are: (1) how federal, tribal, and state sovereignty compete; and (2) how the executive, legislative, and judicial branches of each sovereign attempt to resolve that competition. Many non-tribal judges, officials, and scholars have characterized the relationship and history between these three sovereigns as “unique,” “special,” or “anomalous,” often in an effort to explain aspects of Indian law at odds with basic concepts of fairness and American democratic theory.¹⁶⁵ This is sophistry. There is nothing new about sovereign competition. The history between any two sovereigns is unique in some sense; nonetheless, the same sovereign dynamics, and therefore solutions, apply. This is why the past is prologue;¹⁶⁶ it can provide useful examples.

The American Founding Fathers’ theoretical struggles and debates represent one such useful “prologue” for tribes. The Founders faced the same essential dilemma as tribes—how to create an

165. See, e.g., *United States v. Wheeler*, 435 U.S. 313, 323 (1978) (“The sovereignty that the Indian tribes retain is of a unique and limited character.”); *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 500–01 (1979); *Morton v. Mancari*, 417 U.S. 535, 551–55 (1974) (describing the origin and nature of the “special relationship” between tribes and the federal government); *United States v. Kagama*, 118 U.S. 375, 381 (1886) (upholding the Major Crimes Act and characterizing the relationship between Indian tribes and the United States as “anomalous” and “complex”).

166. WILLIAM SHAKESPEARE, *THE TEMPEST* act 2, sc. 1.

equitable, sustainable system of government encompassing multiple sovereigns that prevents one sovereign from swallowing another. The Founders' debates provide tribal proponents a tool with which to gauge the perception and consequences of tribal political participation in the forums where law affecting tribes is made, i.e. non-tribal American legislatures and courts.¹⁶⁷ More importantly, the ways the Founders framed these issues still resonate with Americans today on an intuitive level. This resonance provides tribal proponents a lexicon familiar to non-tribal interests with which to press tribal claims. Approaching these issues from this perspective also could provide advantages with courts that see "original intent" as their lodestar.

A. *The Centrality of Consent and Voting as a Means of Expressing It*

Much of the Founders' concept of government came from the Enlightenment's social contract theorists, particularly John Locke.¹⁶⁸ As Locke wrote: "Men Being . . . by nature all free, equal, and independent, no one can be put out of this estate, and subjected to the political power of another, without his own consent."¹⁶⁹ In Federalist No. 22, Alexander Hamilton wrote: "The fabric of American Empire ought to rest on the solid basis of *the consent of the People*. The streams of national power ought to flow immediately from that

167. See, e.g., Robert N. Clinton, *Tribal Courts and the Federal Union*, 26 WILLAMETTE L. REV. 841, 844 (1990); Clinton, *supra* note 40, at 246–52; Johnson, *supra* note 47, at 987–89; Richard A. Monette, *Governing Private Property in Indian Country: The Double-Edged Sword of the Trust Relationship and Trust Responsibility Arising Out of Early Supreme Court Opinions and the General Allotment Act*, 25 N.M. L. REV. 35, 36 (1995) [hereinafter Monette, *Governing Private Property in Indian Country*]; Richard A. Monette, *A New Federalism for Indian Tribes: The Relationship Between the United States and Tribes in Light of Our Federalism and Republican Democracy*, 25 U. TOL. L. REV. 617, 623 (1994) [hereinafter Monette, *A New Federalism for Indian Tribes*].

168. See BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 26–30 (1967); JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* 28–29 (3d ed. 2008); THOMAS L. PANGLE, *THE SPIRIT OF MODERN REPUBLICANISM: THE MORAL VISION OF THE AMERICAN FOUNDERS AND THE PHILOSOPHY OF LOCKE* 2 (1988); Clinton, *supra* note 40, at 127 n.35; Richard A. Epstein, *Liberty Versus Property? Cracks in the Foundations of Copyright Law*, 42 SAN DIEGO L. REV. 1, 3–6 (2005); Adam Mossoff, *Locke's Labor Lost*, 9 U. CHI. L. SCH. ROUNDTABLE 155, 155 (2002) ("A mere listing of the primary and secondary sources—from the Founding Fathers to today—that explicitly refer to Locke or implicitly invoke his ideas would rival the Encyclopaedia Britannica in length. His labor argument for property, in particular, has been especially influential.").

169. JOHN LOCKE, *THE SECOND TREATISE OF CIVIL GOVERNMENT AND A LETTER CONCERNING TOLERATION* 49 (J.W. Gough ed., MacMillan 1946) (1690).

pure original fountainhead of all legitimate authority.”¹⁷⁰ “[T]he only reason why a free and independent man was bound by human laws was this—that he bound himself.”¹⁷¹ “To be bound otherwise than by one’s own consent was to be reduced to slavery.”¹⁷² Some find fault with social contract theorists’ concept of consent,¹⁷³ but scholarly arguments seem lost to popular acceptance, practicality, and sheer use of this conceptualization of consent in American government.¹⁷⁴

Judges, scholars, and philosophers from Locke to modern times have perceived the consent given by citizens and how it is expressed in several ways. Citizens give what can be termed a general, initial consent to the form and authority of a government in one of two ways: (1) expressly, as through the naturalization process,¹⁷⁵ or (2) impliedly,¹⁷⁶ by maintaining a presence within the government’s territory and enjoying the benefits associated with that presence.¹⁷⁷ However,

170. THE FEDERALIST No. 22, at 146 (Alexander Hamilton) (J. Cooke ed. 1961) (emphasis in original). See also THE FEDERALIST No. 49, at 339 (James Madison) (J. Cooke ed. 1961); Clinton, *supra* note 167, at 844 (“[F]ederalist theory . . . generally viewed consent of the governed through the constitutional social contract as the fountainhead of governmental legitimacy.”). Hamilton thought one of the weaknesses of the Articles of Confederation was that the people had never ratified them. THE FEDERALIST No. 22, at 145–46 (Alexander Hamilton) (J. Cooke ed. 1961); THE FEDERALIST No. 49, 339 (James Madison); Johnson, *supra* note 47, at 978 n.24.

171. BAILYN, *supra* note 168, at 174 (internal quotation marks and citation omitted).

172. Johnson, *supra* note 47, at 979; see also BAILYN, *supra* note 168, at 234 (“[H]e who has authority ‘to restrain and control my conduct in any instance without my consent hath in all.’”).

173. See, e.g., A. John Simmons, *Consent, Free Choice, and Democratic Government*, 18 GA. L. REV. 791, 802–03 (1984).

174. See Matthew L.M. Fletcher, *The Supreme Court’s Legal Culture War Against Tribal Law*, 2 INTERCULTURAL HUM. RTS. L. REV. 93, 104 (2007).

175. 8 U.S.C. §§1421–1458 (2006).

176. JOHN LOCKE, SECOND TREATISE ON GOVERNMENT, IN TWO TREATISES ON GOVERNMENT § 119 (P. Laslett rev. ed. 1963) (1698) (“[E]very Man, that hath any Possession, or Enjoyment, of any part of the Dominions of any Government, doth thereby give his tacit Consent, and is as far forth obliged to Obedience to the Laws of that Government, during this Enjoyment, as anyone under it; whether this his Possession be of Land, to him and his Heirs for ever, or a Lodging only for a Week; or whether it be barely travelling freely on the Highway . . .”).

177. Birth constitutes a third type of implied general consent. Consent is implied from birth in the territory, i.e. *jus soli*. BLACK’S LAW DICTIONARY 880 (8th ed. 2004). It is also implied from birth to a parent who is a citizen, i.e. *jus sanguinis*. BLACK’S LAW DICTIONARY 880 (8th ed. 2004). In reality, however, the unborn cannot consent to anything. The same can be said for children in general until they become self sufficient enough to emigrate should they choose to do so, and assuming such migration is possible. Consequently, this article limits itself to forms of consent that can be given or withheld freely.

citizens of a *democratic* government give another, more specific and equally important, type of consent—ongoing, broad-based political participation, including, but not limited to, voting.

“[T]he colonial theorists developed the belief that representatives to a legislative body are attorneys or agents of their constituents and accountable for the use of the power which is delegated to them. Representation so viewed implied the continuous day-by-day consent of the governed.”¹⁷⁸ “Government . . . gain[s] its authority from [the people’s] continuous consent,”¹⁷⁹ as expressed through voting.¹⁸⁰ “[C]onsent and the withholding of consent [are] the primary means of holding government accountable for its actions. . . . Accountability is not simply a response to crises or abuses, but rather is a feature of the routine conduct of the public policy process.”¹⁸¹ In other words, voting in periodic elections provides the mechanism through which Americans attempt to ensure that the government accurately and continuously reflects the will of the people. U.S. Supreme Court Justice Stephen Breyer calls this “active liberty,” i.e. “an active and constant participation in collective power” and a “sharing of a nation’s sovereign authority among its people.”¹⁸² Professor Hill and Justice Breyer are far from alone in their perspectives.¹⁸³

B. Self-Interested Power Seeking and Imperium in Imperio

Much has been written about the intensity of the disagreements preceding the adoption of our present Constitution. Great men engaged in high-minded debates, newspaper articles traded barbs, and delegates took hostages to achieve quorum when necessary.¹⁸⁴

178. Johnson, *supra* note 47, at 978.

179. BAILYN, *supra* note 1688, at 173.

180. Francis R. Hill, *Putting Voters First: An Essay On The Jurisprudence Of Citizen Sovereignty In Federal Election Law*, 60 U. MIAMI L. REV. 155, 158 (2006) (The consent that forms the basis of American government is “a process of continuing consent, expressed through continuing participation.”) (emphasis added).

181. *Id.* at 159.

182. STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 5, 15 (2005).

183. See, e.g., J. P. PLAMENATZ, CONSENT, FREEDOM AND POLITICAL OBLIGATION 168, 170–71 (2d ed. 1968) (“Where there is an established process of election to an office, then, *provided the election is free*, anyone who takes part in the process consents to the authority of whoever is elected to the office.”) (emphasis added); ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 11–14 (1948); PETER SINGER, DEMOCRACY AND DISOBEDIENCE 50–51 (1973); Alan Gewirth, *Political Justice*, in SOCIAL JUSTICE 137–38 (Richard B. Brandt ed. 1972).

184. CECILIA M. KENYON, MEN OF LITTLE FAITH: THE ANTI-FEDERALISTS ON THE

But as much as early Americans disagreed over the proposed Constitution, it was what they *agreed on* from which we can learn the most in the present context. The fact that the opposing sides agreed on certain principles of government gives some indication of the validity of these ideas. Advocates both for and against the new Constitution had a clear idea of how much was at stake, the basic needs of the new nation, and the theoretical tensions at issue. They disagreed mainly about whether the new Constitution sufficiently met those challenges, not what the challenges were.

They agreed that human beings were self-interested and therefore power-seeking by nature. “Brutus,” considered one of the most well-reasoned and articulate of the Anti-Federalist essayists, wrote in 1787: “[I]t is a truth confirmed by the unerring experience of ages, that every man, and every body of men, invested with power, are ever disposed to increase it, and to acquire a superiority over every thing that stands in their way.”¹⁸⁵ Professor Jack N. Rakove of Stanford wrote:

[This] presumption . . . bore the imprint of the ideology that had carried the colonists from resistance to revolution in the decade before independence: the belief that the innate human craving for power would exploit any opportunity to exercise dominion. Create a constitution that merely permitted the abuse of power, this theory predicted, and those who wielded it would soon find and exploit its weakest points for their own insidious and ambitious ends.¹⁸⁶

They also agreed that if two sovereigns try to exert authority over the same people, territory, or both, at the same time, one will

NATURE OF REPRESENTATIVE GOVERNMENT (1955), *reprinted in* THE ANTIFEDERALISTS, at xxi–xxiv (Cecelia M. Kenyon ed., Northeastern University Press 1985) (1966); THE ADDRESS AND REASONS OF DISSENT OF THE MINORITY OF THE CONVENTION OF THE STATE OF PENNSYLVANIA TO THEIR CONSTITUENTS (1787), *reprinted in* THE ANTIFEDERALISTS, at 27–28 (Cecelia M. Kenyon ed., Northeastern University Press 1985) (1888); *see also* THE ADDRESS AND REASONS OF DISSENT OF THE MINORITY OF THE CONVENTION OF PENNSYLVANIA TO THEIR CONSTITUENTS (1787), *reprinted in* THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES, at 241 (Ralph Ketcham ed., insert publisher here 2003) (1986) (“The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to their Constituents,” PENNSYLVANIA PACKET AND DAILY ADVERTISER, December 18, 1787).

185. “BRUTUS,” ESSAY I (1787), *reprinted in* THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES, at 275 (Ralph Ketcham ed., 2003) (1986) (“Brutus,” Essay I, New York Journal, Oct. 18, 1787).

186. JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 182–83 (1996); *see also* KENYON, *supra* note 184, at xlv, lxii–lxv.

necessarily succumb to the other.¹⁸⁷ Political commentators of the time referred to this concept as “*imperium in imperio*.”¹⁸⁸ Any assertion to the contrary was an absurdity, a “solecism.”¹⁸⁹ The Federalists accepted the validity of this concept, but thought the new Constitution sufficiently, although not completely, addressed the problem with its innovative approach to division of power—the reserved rights concept embodied in the Tenth Amendment.¹⁹⁰ The Federalists thought the Anti-Federalists were simply too afraid of the novelty to try it.¹⁹¹

187. THE ADDRESS AND REASONS OF DISSENT OF THE MINORITY OF THE CONVENTION OF PENNSYLVANIA TO THEIR CONSTITUENTS (1787), *reprinted in* THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES, at 244 (Ralph Ketcham ed., 2003) (1986); THE ANTI-FEDERALIST PAPERS, *supra* note 184, at 244 (“The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to their Constituents . . .”). (“We apprehend that two co-ordinate sovereignties would be a solecism in politics. That therefore as there is no line of distinction drawn between the general, and state governments; as the sphere of their jurisdiction is undefined it would be contrary to the nature of things, that both should exist together, one or the other would necessarily triumph in the fullness of dominion.”); THE FEDERALIST NO. 20, at 134 (James Madison and Alexander Hamilton) (Clinton Rossiter ed., 2003) (“Federalist No. 20: The Same Subject Continued” (Madison with Hamilton)).

188. THE FEDERALIST NO. 15, at 103 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

189. “1. Impropropriety in language, or a gross deviation from the rules of syntax; incongruity of words; want of correspondence or consistency. A barbarism may be in one word; a solecism must be of more. 2. Any unfitness, absurdity or impropriety.” WEBSTER’S AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828).

190. The Tenth Amendment started out as a mainstay of Constitutional jurisprudence. Patrick M. Garry, *A One-Sided Federalism Revolution: The Unaddressed Constitutional Compromise on Federalism and Individual Rights*, 36 SETON HALL L. REV. 851, 851–64, 873–77 (2006); David N. Mayer, *Justice Clarence Thomas and the Rediscovery of the Tenth Amendment*, 25 CAP. U. L. REV. 339, 339–78 (1996). However, it became somewhat of a dead letter from the late 1930s to the mid 1990s. Garry, *supra*, at 861–66; Mayer, *supra*, at 379–410. It has enjoyed somewhat of a revival since the Rehnquist Court. Garry, *supra*, at 866–73; Mayer, *supra*, at 388–410.

191. RAKOVE, *supra* note 186, at 162 (citing 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 989, 995–96 (Merrill Jensen et al. eds., 1990) (Madison wrote that the “only way to judge the Constitution was to ‘consider it minutely in its parts’” while recognizing that “[i]t is in a manner unprecedented: We cannot find one express example in the experience of the world:—It stands by itself.”); RAKOVE, *supra* note 186, at 181; THE FEDERALIST NO. 15, at 103 (Alexander Hamilton) (Clinton Rossiter ed., 2003) (“Federalist No. 15: The Insufficiency of the Present Confederation to Preserve the Union” (Hamilton)) (“While [the Anti-Federalists] admit that the government of the United States is destitute of energy, they contend against conferring upon it those powers which are requisite to supply that energy. They seem still to aim at things repugnant and irreconcilable; at an augmentation of federal authority without a diminution of State authority; at sovereignty in the Union and complete independence in the members. They still, in fine, seem to cherish with blind devotion the political monster of an *imperium in*

Interestingly, Anti-Federalists had some fairly specific ideas of how and how fast this consolidation would occur. Two main theories existed. Some thought the new Constitution squeezed the states out from the beginning;¹⁹² others thought the process would happen over time, bit by bit, federal law by federal law, federal judgment by federal judgment.¹⁹³ “Brutus” thought the process would happen over time. “[A]lthough the government reported by the Convention does not go to a perfect and entire consolidation, yet it approaches so near to it, that it must, if executed, certainly and infallibly terminate in it.”¹⁹⁴

Five aspects of the proposed government represented the greatest risk of consolidation of power, according to the Anti-Federalists: (1) the creation of a standing federal army, (2) the unlimited nature of the federal government’s authority to tax, (3) the malleability of the “Necessary and Proper” Clause, (4) the potential for abuse of the Supremacy Clause, and (5) the independence of the federal judiciary.¹⁹⁵ Anti-Federalists worried the states would have no revenue because any conflict between state and federal taxation would be trumped by the Supremacy Clause as interpreted by the Federal Judiciary and enforced by federal troops. Anti-Federalists also thought the ambiguity of the Necessary and Proper Clause meant the legislative authority of the federal government would eventually be interpreted as boundless, and ultimately be used by federal courts again wielding the Supremacy Clause to abolish state laws at will, again backed up by federal forces. In other words, the Anti-Federalists thought they would end up having hostile federal laws

imperio.”).

192. KENYON, *supra* note 184, at xlii–xliii.

193. RAKOVE, *supra* note 186, at 181 (“[C]onsolidation had two distinct meanings [to the Anti-Federalists]: one descriptive, one predictive. They did not entirely agree whether consolidation inhered in the ‘absolute and uncontrollable’ the Union would immediately possess over those ‘objects’ placed under its control; or whether it was better conceived as a tendency that would unfold gradually but ineluctable as the new government deployed its powers and monopolized the most productive sources of revenue to render the states impotent for all effective purposes of government.”). “Centinel,” an Anti-federalist essayist, wrote: “It is a solecism in politics for two co-ordinate sovereignties to exist together, you must separate the sphere of their jurisdiction, or after running the race of dominion for some time, one would necessarily triumph over the other.” CENTINEL NO. 5 (July 31, 1789), *reprinted in* 14 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, at 343–48 (John P. Kaminski & Gaspare J. Saladino eds., 1983), *available at* <http://www.consource.org/index.asp?bid=582&documented=270>.

194. “BRUTUS,” ESSAY I (1787), *reprinted in* THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 271 (Ralph Ketcham ed.) (1986).

195. RAKOVE, *supra* note 186, at 183–88; KENYON, *supra* note 184, at xlii–xlvii.

broadly interpreted and unilaterally imposed on their states with their only recourse being to a biased court¹⁹⁶—a proposition strikingly similar to that faced by tribes today.

IV. COUNTING THE GREEKS IN THE HORSE: PARSING THE IMPLICATIONS OF TRIBAL PARTICIPATION IN NON-TRIBAL POLITICS

Part II began this article with an examination of what tribes and tribal citizens have gained through participation in non-tribal politics. Part IV will close the substantive sections of this article with the other side of the equation—how tribes risk their sovereignty by participating.

A. *Tribal Consent to Non-Tribal Authority*

Without question, tribes and tribal citizens have fully and voluntarily engaged in the kinds of “active liberty” that constitute consent to be governed by both state and national government. They have fervently sought, at incredible time and expense, to be included in the “process of continuing consent, expressed through continuing participation.”¹⁹⁷ Their efforts have been aimed at being part of the electorate to whom elected officials are accountable, and whose will those officials are supposed to reflect, under pain of loss of office. They engage in the exact same activities non-tribal communities do and direct those activities at the same institutions non-tribal citizens do with increasing success.

Individuals with tribal ancestry who are not enrolled in a tribe and do not live on the tribe’s reservation provide a useful foil and point of analytical departure. Individuals that fit this description have no nexus with tribal government. They are not part of the tribal body politic and do not live in the territory governed by the tribe. Consequently, they present no opportunity for tribal government to conflict

196. With regard to the proposed powers of the Supreme Court, “Brutus” wrote that they would, “operate to effect, in the most certain, but yet silent and imperceptible manner, what is evidently the tendency of the constitution—I mean, an entire subversion of the legislative, executive and judicial powers of the individual states. Every adjudication of the supreme court, on any question that may arise upon the nature and extent of the general government, will affect the limits of the state jurisdiction. In proportion as the former enlarge the exercise of their powers, will that of the latter be restricted. BRUTUS, ESSAY XI (1788), *reprinted in* THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 296 (Ralph Ketcham ed., Mentor Pub. 2003) (1986).

197. See Hill, *supra* note 180.

with another sovereign, state or national. They are only genetically, and possibly culturally, “Indian,” but not politically. Non-tribal anti-discrimination laws, like the Voting Rights Act, legitimately protect the rights of these individuals within the sovereigns to which they belong.

Tribal citizens, on the other hand, are *politically* “Indian.” When tribal citizens participate in state and federal politics, they literally embody the unification of tribal, state, and federal sovereignty. Their participation amounts to consent to be governed by all three, bringing tribal sovereignty into conflict with federal and state sovereignty. If tribal citizens reside on the reservation when they participate—i.e. if they are reservation citizens—they invite state government onto the reservation, validating existing assertions of non-tribal authority there and inviting future assertions.¹⁹⁸ The problem manifests when these individuals, or non-Indians within tribal territory, are presented with conflicting laws. In such a situation, which do they follow, and which will be enforced by the courts? Over time, which laws will generally dominate, giving force to the customs and values of the culture that made them? This conflict is played out throughout the body of Indian law.¹⁹⁹

198. Participation in tribal political processes by tribal citizens who live off reservation presents an interesting and problematic inverse corollary. See *infra* Part IV.C.2.; S.E. Ruckman, *Creeks Step Closer to Constitutional Amendment*, NATIVE AM. TIMES, Jan. 30, 2009, at 1.

199. See, e.g., *South Dakota v. Bourland*, 508 U.S. 679 (1993) (holding that inherent sovereignty did not enable the Tribe to regulate non-Indian hunting and fishing in taken areas); *Duro v. Reina*, 495 U.S. 676 (1990) (holding that an Indian tribe may not assert criminal jurisdiction over a nonmember Indian); *Brendale v. Confederate Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989) (holding that the tribe had authority to zone property in areas of its reservation that were closed to the general public); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 (1987) (holding state and local laws may be applied to on-reservation activities of tribes and tribal members, even though not expressly authorized by Congress, when state authority is not pre-empted by the operation of federal law; pre-emption occurs when state jurisdiction interferes or is incompatible with federal and tribal interests reflected in federal law, unless state interests at stake are sufficient to justify the assertion of state authority); *Montana v. United States*, 450 U.S. 544, 563 (1981) (holding that the Crow Indian Tribe had no power to regulate non-Indian fishing and hunting on reservation land owned in fee by nonmembers of the Tribe); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 141 (1980) (quoting *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1831)) (holding state motor carrier and fuel tax pre-empted from application to logging company doing business with tribe in tribal territory); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (holding that Indian tribal courts do not have inherent criminal jurisdiction to try and punish non-Indians for crimes committed on a reservation); *McClanahan v. Ariz. State Tax Comm’n*, 411 U.S. 164, 172 (1973) (holding Arizona income tax inapplica-

The establishment of state legislative districts within reservations, and the election of reservation citizens to represent those districts, essentially, if not literally, make reservations part of the surrounding state and suggest that tribes consent to state authority.²⁰⁰ By sending a reservation citizen to the state legislature to represent a district that encompasses reservation lands, tribes put themselves on the same level with other political subdivisions of the state over which the state has considerable authority. Equating reservation lands with state political subdivisions marginalizes the perception of tribes as separate governments with independent sovereign powers, and makes them appear more like counties and cities, i.e. simple organizational substructures incorporated under the authority of the state and subject to that authority.

The one political activity that tribes can, and historically have, engaged in that does not amount to consent to be governed is lobbying. Tribes have advocated their position to non-tribal governments and communities since first contact without such behavior being seen as categorically unfair²⁰¹ or an implied invitation to govern. Tribes and non-tribal governments termed these efforts as “negotiations” when tribes were universally seen as separate; “lobbying” is just the name they have been given since non-tribal governments laid sovereign claim to tribal citizens and lands.

Some might assert that concerns about the consequences of participation are merely theoretical, that the Supreme Court has shown a willingness to give some measure of substance to tribal sovereignty, that federal policy at the moment supports self-determination, and that Congress has clearly rejected the extinction of tribes as a goal. These observations do provide a measure of reassurance. However,

ble to reservation citizen who derived all her income from reservation sources); *Worcester*, 31 U.S. (6 Pet.) 515 (holding that state statutes control in the Cherokee town of New Echota, which overlapped with Gwinnett county, Georgia); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831) (denying an injunction to restrain the State of Georgia from executing and enforcing the laws of Georgia within the Cherokee territory).

200. Such annexation is usually considered an act of war absent consent. James P. Terry, *The President as Commander in Chief*, 7 AVE MARIA L. REV. 391, 455 (2009) (describing Iraq annexation/occupation of Kuwait); Robert D. Sloane, *The Changing Face of Recognition in International Law: A Case Study of Tibet*, 16 EMORY INT’L L. REV. 107, 134 (2002) (describing Chinese annexation of Tibet); Shaun Walker, *Ossetians Warm to Moscow’s Embrace*, INDEP. ON SUNDAY, Aug. 9, 2009, at News (describing Russian annexation of part of Georgia).

201. Some question the fairness of tribes being able to donate in the amounts recently seen, but few, if any, have questioned the ability of tribes to lobby generally.

these machinations of *imperium in imperio* are best seen from the “forest” level over time,²⁰² and the U.S. Supreme Court has increasingly used participation-based reasoning—as opposed to territory-based or Indian/non-Indian race-based reasoning—to resolve sovereignty conflicts contrary to tribal interests.

The Court has clearly relied on participation-based reasoning in the area of tribal criminal jurisdiction,²⁰³ stating reluctance “to adopt a view of tribal sovereignty that would single out [a] group of citizens, nonmember Indians, for trial by political bodies that do not include them.”²⁰⁴ The Supreme Court just as clearly relied on participation-based reasoning in the area of tribal regulatory authority over non-citizens. The rules for determining the extent of a tribe’s authority within its own territory turn in part on whether non-tribal citizens and non-Indian lands are involved.²⁰⁵ Tribes’ inherent civil regulatory authority generally does not apply to “nonmembers” on “non-Indian” land and extends only to what is “necessary to protect tribal self-government or to control internal relations.”²⁰⁶ In a case about land-use regulation, the Court explicitly compared reservation citizens and non-Indian residents in terms of population, land ownership, ability to vote in county elections, ability to vote in tribal elections, and access to tribal services.²⁰⁷ The Court has made member/nonmember

202. See *infra* Part IV.B.

203. In *Oliphant v. Suquamish Indian Tribe*, the Court made specific note of the large non-Indian presence on the reservation in terms of both land ownership and population, and that nonmembers could not serve on tribal juries. 435 U.S. 191, 193 n.1, 193–94, 194 n.4 (1978). *Oliphant* ultimately held that the exercise by tribes of criminal jurisdiction over non-Indians was “inconsistent with [tribes’] status” and contrary to the federal government’s “great solicitude that its citizens be protected by the United States from unwarranted intrusions on their personal liberty.” *Id.* at 208, 210 (emphasis in original). *Duro v. Reina* similarly concluded that jurisdiction over nonmember Indians is an “external” power “inconsistent with the Tribe’s dependent status.” 495 U.S. 676, 684, 686 (1990). *Duro* explicitly based part of its reasoning on the inability of nonmember Indians to participate in the government prosecuting them. *Id.* at 693–94; see, e.g., Joseph William Singer, *Canons of Conquest: The Supreme Court’s Attack on Tribal Sovereignty*, 37 NEW ENG. L. REV. 641, 665–68 (2003) (explaining that the longstanding notion of “retained inherent sovereignty . . . is compatible with core American values”). Interestingly, participation concerns do not factor in the state context, or even the international context, absent obvious disparities in procedural protections. See also COHEN, *supra* note 45, at 226–28.

204. *Duro*, 495 U.S. at 693.

205. *Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1997); *Brendale*, 492 U.S. at 446; *Montana*, 450 U.S. at 563–65; see also COHEN, *supra* note 45, at 229–32 (explaining that it matters whether tribal or non-citizens are involved).

206. *Montana*, 450 U.S. at 563–65.

207. *Brendale*, 492 U.S. at 445–47.

demographics a factor to consider in diminishment cases where guidance is not found from treaties, statutes, or legislative history.²⁰⁸

Admittedly, these cases and rules use demographics to make needed divisions between tribal and state sovereignty, but the balance of power has fallen much farther in favor of the opposing sovereignty than in other non-tribal contexts. If a court or legislature sought to justify further state authority inside reservations, it would be a simple matter to shift the focus of inquiry from how non-tribal citizens cannot participate in tribal political processes, to how tribal citizens consent to state authority by participating in state political processes. Such a shift represents a legitimate hazard given the susceptibility of federal Indian law to changes in federal policy and non-tribal courts' willingness to rationalize that policy.²⁰⁹ Moreover, tribes are not well positioned from an advocacy standpoint to counter such a shift given that willingness to participate in a democratic process equates to a willingness to be bound by the products of that process.

B. Imperium in Imperio: *A Cancer in Indian Country*

Tribal consent to state and federal authority via participation brings the problem of multiple sovereignties squarely into play.²¹⁰ Unfortunately, the problem faced by tribes is more complicated than that faced by the Founders. In the federal-state context, federal sovereignty overlaps the sovereignty of each state, but states do not overlap each other individually. This limited the difficulty faced by The Founders to coherently segregating authority between two sovereign spheres, not three. Participation by tribes in federal and state elections creates a three-way competition for governance for which no stable or coherent, i.e., normative, answer presently exists. The Marshallian conception of the relationship between these

208. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 356–57 (1998); *Solem v. Bartlett*, 465 U.S. 463, 470–72 nn.12–13 (1984) (“When an area is predominately populated by non-Indians with only a few surviving pockets of Indian allotments, finding that the land remains Indian country seriously burdens the administration of State and local governments. . . . Resort to subsequent demographic history is, of course, an unorthodox and potentially unreliable method of statutory interpretation. However, in the area of surplus land acts, where various factors kept Congress from focusing on the diminishment issue, technique is a necessary expedient.”); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 602–14 (1977).

209. See *infra* Part IV.B.

210. One federal official during the allotment period used the term “*imperium in imperio*” to describe the tribal sovereign dilemma 125 years ago. Gates, *supra* note 79, at 49 (“Politically [the tribe] is an anomaly—an *imperium in imperio*.”).

spheres of sovereignty kept them relatively separate. However, they have gone from a position of relative separation to substantial overlap, resulting in steady losses of tribal sovereignty via judicial decision, along much the same lines as Anti-Federalists feared would result under the present U.S. Constitution.

The Founders originally thought of tribes and tribal territories as entirely separate up to the point that the federal government extinguished a tribe's right of occupancy.²¹¹ Chief Justice John Marshall had great "conceptual clarity"²¹² about the division between tribes, states, and the federal government, stating that (1) tribal territory was distinct from state territory, (2) states did not have authority in tribal territory and state citizens could not venture there without permission from the tribe or the federal government, and (3) the federal government had exclusive authority to deal with tribes, but none to regulate their internal affairs.²¹³ The Court since has consistently confirmed tribal authority over its citizens and their activities within the tribal territory;²¹⁴ however, exercises of tribal sovereignty in this context do not compete with any other sovereign. Competition occurs when tribes assert authority over non-Indians or non-citizen Indians within tribal territory, or states assert any type of authority within tribal territory. Tribal authority in these contexts has steadily diminished.²¹⁵

The broadest rejection of tribal jurisdiction over non-citizens came in the criminal area. In 1978, in *Oliphant v. Suquamish Indian Tribe*,²¹⁶ the U.S. Supreme Court held that tribes lacked any amount of criminal jurisdiction over "non-Indians" regardless of where jurisdiction was asserted (e.g., Indian fee land, tribally held land, federally

211. See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 560 (1832); *supra* note 31.

212. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973).

213. *Worcester*, 31 U.S. (6 Pet.) at 561.

214. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 71–72 (1978); *United States v. Wheeler*, 435 U.S. 313, 322–23 (1978). The powers of Indian tribes are not delegated, but instead are "inherent powers of a limited sovereignty which has never been extinguished." *Wheeler*, 435 U.S. at 322–23 (quoting FELIX COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 122 (1945) ("Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status."); *id.* at 323 (citing *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978))).

215. COHEN, *supra* note 45, at 220, 224–37 ("[B]eginning in 1978, the Supreme Court has substantially limited tribal power over nonmembers."; "[*Nevada v. Hicks* fits within the recent trend of decisions disfavoring tribes' power to govern the conduct of nonmembers . . .").

216. 435 U.S. 191 (1978).

held land, or non-Indian fee land).²¹⁷ In contrast, the Supreme Court has generally upheld tribal assertions of regulatory authority over non-citizens within tribal territory so long as the land where the assertion occurs is held by the tribe, the federal government, or a tribal citizen.²¹⁸ However, the presumption reverses on non-Indian fee land²¹⁹ and public rights-of-way.²²⁰ In 1981, the Court wrote that “exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.”²²¹ Exceptions exist for non-citizens entering “consensual relationships,” and “conduct [that] threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”²²² At first glance, the rule and exceptions seem capable of broad interpretation, akin to the “health, safety and welfare” phrasing of broadly construed state police powers. Unfortunately, interpretations in 1997 and 2001 have taken a narrower position.²²³

Turning to where states have sought to assert jurisdiction within tribal territory, the U.S. Supreme Court backed away from “reliance on platonic notions of Indian sovereignty” in the early 1970s.²²⁴ In the 1980s, the Court acknowledged that it had fully “departed from Mr. Chief Justice Marshall’s view that ‘the laws of [a State] can have no force’ within reservation boundaries,” abandoning a “rigid rule” in

217. See also *supra* note 196 (explaining *Oliphant*’s implications on criminal jurisdiction non-Indians). The Court later expanded this to prohibit tribal jurisdiction over non-citizen Indians. *Duro v. Reina*, 495 U.S. 676 (1990). Congress quickly authorized tribal jurisdiction in such circumstances. 25 U.S.C. § 1301(2) (2006); *United States v. Lara*, 541 U.S. 193, 200 (2004).

218. *Montana v. United States*, 450 U.S. 544, 557 (1981). Cf. *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 433–48 (suggesting that limitation of access by the general public to non-citizen fee lands is sufficient for tribal regulatory authority).

219. *Montana*, 450 U.S. at 563–65.

220. *Strate v. A-1 Contractors*, 520 U.S. 438, 454–56 (1997) (state highway equated to non-Indian fee land for purposes of determining adjudicative jurisdiction; neither *Montana* exception met; not consensual because suit sounded in tort; not the contract that brought the defendant into tribal territory; provision of governmental services not sufficient to be meet consensual exception).

221. *Montana*, 450 U.S. at 564.

222. *Id.* at 565–66.

223. See *Strate*, 520 U.S. at 438; *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 647 (2001) (Navaho Tribe could not tax non-Indian guests of hotel located on non-Indian fee land); *Nevada v. Hicks*, 533 U.S. 353 (2001); see also COHEN, *supra* note 45, at 220, 224–37.

224. *McClanahan v. State Tax Comm’n of Ariz.*, 411 U.S. 164, 172 (1973).

favor of a balancing approach that allowed consideration of state interests in deciding whether to enforce state laws within tribal territory.²²⁵ More recently, Justice Scalia forcefully stated that “[s]tate sovereignty does not end at a reservation’s border,”²²⁶ thus marking “the decline and fall” of Marshallian conceptual clarity.²²⁷ Tribal sovereignty now forms a mere “backdrop” against which state, federal, and tribal interests are all considered.²²⁸ Sometimes the balance weighs in favor of tribes;²²⁹ sometimes it does not.²³⁰ Standard conceptions of sovereignty no longer provide a “definitive resolution”²³¹ to issues that would be simple questions in the state-state context.²³² At one point, a third of the Supreme Court suggested a

225. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, at 141–45 (1980) (quoting *Worcester v. Georgia*, 31 U.S. (6 Pet.) at 515, 520 (1832)). State motor carrier and fuel tax pre-empted from application to logging company doing business with tribe in tribal territory); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, at 215–16 (1987) (holding that state and local laws may be applied to on-reservation activities of tribes and tribal members, even though not expressly authorized by Congress, when state authority is not pre-empted by the operation of federal law; noting that pre-emption occurs when state “jurisdiction interferes or is incompatible with federal and tribal interests reflected in federal law, unless state interests at stake are sufficient to justify the assertion of state authority”) (quoting *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983)); see also *South Dakota v. Bourland*, 508 U.S. 679 (1993).

226. *Hicks*, 533 U.S. at 361–62. *Hicks* appears to be very nearly a polar opposite of *Worcester*. Where Chief Justice John Marshall drew a line in the sand when Georgia reached into Cherokee Territory, Justice Scalia trumpeted the breach of the Fallon Paiute-Shoshone Tribe’s border when Nevada law enforcement rushed into Fallon Paiute-Shoshone Tribe’s Territory.

227. THOMAS T. ALEXANDER ALEINIKOFF, *SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP* 112–13 (2002).

228. *McClanahan*, 411 U.S. at 172 (1973) (“The Indian sovereignty doctrine is relevant . . . because it provides a backdrop against which the applicable treaties and federal statutes must be read.”); *Bracker*, 448 U.S. at 143 (citing *McClanahan*, 411 U.S. at 164).

229. *E.g.*, *Cabazon*, 480 U.S. at 202 (finding the state lacked sufficient interest to regulate bingo activities on tribal land); *Bracker*, 448 U.S. at 136 (finding federal law preempted state tax on tribal logging operations); *McClanahan*, 411 U.S. at 164 (finding income tax on Indians unlawful as applied to income wholly derived from reservation activities).

230. *E.g.*, *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989) (holding the state could impose severance taxes on reservation oil production by non-Indian lessees); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 154–59 (1980) (permitting the state to tax non-Indians’ purchases of cigarettes from on-reservation tribal retailers); *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 481–83 (1976) (permitting state cigarette tax on Indian sales to non-Indians).

231. *McClanahan*, 411 U.S. at 172.

232. ALEINIKOFF, *supra* note 227, at 110 (“States are generally understood to have

rule that state regulation of commercial reservation activities that are unlawful under state law is permissible unless and until Congress indicates otherwise.²³³

Taking a broader perspective on the matter, these losses have come in a manner eerily similar to how the Anti-Federalists thought the federal government would consume the states over time, supporting the assertion that *imperium in imperio* is at least partially to blame. Since the clear Marshallian construction of tribal sovereignty, tribes have lost pieces of sovereignty, bit by bit, law by law, judgment by judgment: the ability to protect their citizens from crime regardless of the perpetrator's race (1854, 1885, 1946, 1978, 1990),²³⁴ the ability to manage and protect their environment by uniform regulation throughout their territory (1989),²³⁵ the ability to develop their economies and infrastructures through exclusive uniform taxation (1980, 1989, 2001, 2005),²³⁶ basic respect for their borders (1903,

the authority to regulate (and tax) the activities of non-Indians on reservations; . . . This analysis, of course, differs significantly from principles of federalism and comity that underlie relationships among the states and between states and the federal government. A citizen of Montana who ventures to Wyoming is fully subject to Wyoming civil and criminal jurisdiction, and federal power cannot generally provide Montanans immunity from Wyoming courts for a crime committed in Cheyenne . . . American constitutional law does not treat these as difficult questions.”).

233. *Cabazon*, 480 U.S. at 222–27 (Stevens, J., O'Connor, J., and Scalia, J., dissenting).

234. Indian Country Crimes Act of 1854, ch. 24, § 3, 10 Stat. 270 (codified as amended at 18 U.S.C. § 1152 (2008)) (extending the general laws of the United States to offenses committed by non-Indians in Indian country); Major Crimes Act of 1885, ch. 341, 23 Stat. 362–85 (codified as amended at 18 U.S.C. § 1153 (2008)) (removing tribal jurisdiction over a set of “major” crimes committed by Indians against Indians); Act of Nov. 5, 1990, Pub. L. No. 101–511, 104 Stat. 1892–93 (codified as amended at 25 U.S.C. § 1301(2) (2001)) (restoring tribal jurisdiction over non-member Indians); *United States v. Lara*, 541 U.S. 193 (2004) (holding the Double Jeopardy Clause could not bar federal prosecution of a non-member Indian in Federal Court despite the defendant having been punished in tribal court); *Duro v. Reina*, 495 U.S. 676 (1990) (finding tribes lack criminal jurisdiction over non-member Indians); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (finding tribes lack inherent criminal jurisdiction over non-Indians); *Williams v. United States*, 327 U.S. 724 (1946) (finding federal laws covering rape applicable to Indian reservations through the Assimilative Crimes Act, 18 U.S.C. § 13).

235. *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989) (limiting tribal authority to zone fee land located within reservation but owned by non-Indians).

236. *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 99 (2005) (Ginsburg, J., dissenting) (permitting state tax on off-reservation receipt of motor fuel by non-Indian fuel distributors who delivered to station owned by Indians on Indian land). “Both the Nation and the State have authority to tax fuel sales at the [tribe-owned gas station]. As a practical matter, however, the two tolls cannot coexist.

1960, 1998, 2001),²³⁷ and the ability to protect their citizens from the unlawful assertions of authority by foreign governments (2001).²³⁸ Moreover, clear analogies exist between these losses and Anti-Federalist concerns regarding competition for tax revenue, broad interpretations of the Necessary and Proper Clause, and abuse of the Supremacy Clause by federal courts. There is no reason to think these losses will end before little remains for tribes to govern in their own territories.

C. *Alternatives to Passive Sovereign Erosion*

If tribal participation brings tribal sovereignty into conflict with federal and state sovereignty in the absence of a limiting factor like the Tenth Amendment, and those conflicts will result in continued losses of sovereignty over time, two questions present themselves: “What can tribes do, if anything?” and “What should tribes do, if anything?” As the current course of tribal participation seems destined to erode tribal sovereignty with no tribal control of the process, the two alternatives appear to be: (1) active pursuit of incorporation, or (2) active pursuit of some measure of separation.

If the Nation imposes its tax on top of Kansas’ tax, then unless the Nation operates [its gas station] at a substantial loss, scarcely anyone will fill up at its pumps. Effectively double-taxed, the [gas station] must operate as an unprofitable venture, or not at all.” *Id.* at 116 (citations omitted). See also *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 653–59 (2001) (finding tribe lacked authority to impose hotel taxes on non-Indian guests at hotel located on non-Indian fee land within the reservation); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989) (finding concurrent state and tribal jurisdiction with regard to the imposition of severance taxes on oil and gas production by non-members); *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134 (1980) (finding concurrent jurisdiction of state and tribal governments to tax cigarette purchases by non-members).

237. See *Nevada v. Hicks*, 533 U.S. 353 (2001) (finding tribal court lacked jurisdiction to try tort claims arising from state officials investigation of off-reservation crime on the reservation); *Fed. Power Comm’n v. Tuscarora Indian Nation*, 362 U.S. 99 (1960) (permitting government taking of Indian fee land for hydraulic power project); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565–67 (1903) (finding Congress has authority to abrogate treaties with Indians); *United States v. Brisk*, 171 F.3d 514, 520–21 (7th Cir. 1999) (finding non-enclave federal drug law enforceable on tribal land because the law did not impermissibly affect the rights of Indians); see generally COHEN, *supra* note 45, at 128–32; Alex Tallchief Skibine, *Applicability of Federal Laws of General Application to Indian Tribes and Reservation Indians*, 25 U.C. DAVIS L. REV. 85 (1991) (arguing that an overriding national interest must exist to apply silent federal laws, on a matter not covered by treaty, to Indian nations).

238. *Nevada v. Hicks*, 533 U.S. 353 (2001) (finding tribal court lacked jurisdiction to try tort claims arising from state officials investigation of off-reservation crime on the reservation).

Decisions²³⁹ need to be made on both the federal and state levels.

1. *The Federal-Tribal Relationship*

Considerable hurdles stand in the way of tribes formally incorporating into the federal union as “States of the Union,” foremost being Article IV, Section 3, Clause 1 of the U.S. Constitution—“no new State shall be formed or erected within the Jurisdiction of any other State.”²⁴⁰ Arguments could be made regarding whether reservations are “within” a state, but the success of any such effort is doubtful without amending the Federal Constitution, which is improbable.

A return to a measured separation based on negotiated treaties would be the simplest alternative to adopt, but also presents considerable hurdles. Precedent for such a relationship exists—everything prior to 1871—and this approach could adequately limit federal authority if a credible retained-rights approach is applied to treaty interpretation.²⁴¹ However, two time-honored sources of guidance suggest that pursuing this approach will be unsuccessful—history and common sense. Historically, non-tribal interests have proven unable to honor treaty agreements and non-tribal courts have consistently increased the breadth of federal and state authority over tribes and tribal lands. On the common sense front, a return to treaty-making is unlikely so long as tribal citizens continue to participate in federal political processes; governments do not negotiate treaties with their own citizens.

On the other hand, significant arguments can be marshaled for continued federal participation. Little reason exists to believe that federal lawmaking with regard to tribes will suddenly cease, or that tribes will abruptly be exempted from all federal laws of “general

239. “Decisions” in this context could take many forms. All decisions affecting the political/governmental substance of the body politic should receive approval from the body politic in some form.

240. U.S. CONST. art. 4, § 3, cl. 1.

241. See, e.g., *Wheeler*, 435 U.S. at 322–23 (1978) (holding that the powers of Indian tribes are not delegated, but instead are “‘inherent powers of a limited sovereignty which has never been extinguished.[:]’” (emphasis omitted) (quoting COHEN ‘S HANDBOOK OF FEDERAL INDIAN LAW 122 (1945)). “Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.” *Id.* at 323 (citing *Oliphant*, 435 U.S. 191 (1978))); see also *United States v. Winans*, 198 U.S. 371, 380–81 (1905) (holding that treaties are not “a grant of rights to the Indians, but a grant of right from them—a reservation of those not granted”).

applicability.”²⁴² Consequently, if those controlled by the products of a government’s political processes have a right to participate in those processes, then tribal citizens have a right to participate in federal political processes. While this reasoning has an uncomfortable “self-fulfilling” aspect, it makes sense and may be unavoidable. However, for continued federal participation to work long term, an answer to the *imperium in imperio* problem must be found.

The details of a new federal-tribal relationship exceed the scope of this article, but some contours can be sketched. The first step would be recognizing the illegitimacy of plenary power, legally and ethically. It has no basis in the Constitution, and runs contrary to any concept of limited federal power or government by consent. It was adopted by a Court seeking to rationalize a federal policy antithetical to tribal sovereignty, and as such represents a kind of judicial activism criticized in other contexts.

The second step would be repealing the grants of authority made under Public Law 280 absent tribal consent. Again, these grants run contrary to the concept that a legitimate government must be based on the consent of those governed.

Third, sustainable federal participation would require returning to a credible retained rights analysis of treaties as envisioned by *United States v. Wheeler*²⁴³ and *United States v. Winans*.²⁴⁴ This would largely serve the same purpose the Tenth Amendment serves between the federal government and the states. Alternatively, federal and tribal governments could negotiate a new affirmative uniform boundary for federal power vis-à-vis the tribes, modeled after Tenth Amendment.

Fourth, a sustainable federal-tribal relationship based on mutual respect and consent would require retrocession of governmental authority over all lands located within the exterior boundaries of all reservations. Tribes lost their exclusive authority over these lands as the result of unilateral and vulgar assertions of power—the Indian Country Crimes Act, the Assimilative Crimes Act, the Major Crimes Act, General Allotment Act and various Termination Acts. Without such a retrocession, allotment and termination have never truly ended because the consequences of these policies—the destruction

242. See *Fed. Power Comm’n v. Tuscarora Indian Nation*, 362 U.S. 99, 116–17 (1960) (holding that general acts of Congress with terms applying to all people include Indians); COHEN, *supra* note 45, at 128–32; Skibine, *supra* note 237.

243. 435 U.S. at 322–23.

244. 198 U.S. at 381 (holding that treaties are not “a grant of rights to the Indians, but a grant of right from them, a reservation of those not granted”).

of tribal territories—have been perpetuated. Any argument defending the status quo simply makes the arguer complicit in the original unjust act.²⁴⁵

Some authors have expressed concern that participating in federal political processes will essentially hollow out tribes, culturally and governmentally.²⁴⁶ However, evidence that culture can survive incorporation into the federal fabric exists—the states themselves. One of the goals of the American federal arrangement was to allow individual states to retain their individual culture and law by only establishing as much centralized government as was necessary and leaving the states as much authority as possible to control their own dominions.²⁴⁷ Disagreement can be had about the *level* of success the United States has achieved on this front,²⁴⁸ but no one thinks the cultures of California, Texas, Georgia, Iowa, New York, or Massachusetts are the same. The real danger of loss of culture comes from incorporation into state government, where the American federal arrangement left the “vast inherency” of authority to embody culture in law.

2. *Choosing to Incorporate with the States*

Tribes that see continued participation in state politics as desirable, or possibly unavoidable, might wonder why there is any practical or ethical need for them to change the status quo. On the contrary, both a practical and an ethical reason to affirmatively seek incorporation exist. Practically speaking, most tribes’ current course of action will ultimately result in their incorporation into surrounding states, but will not afford them much, if any, control over the outcome of that incorporation. Absent affirmative tribal action, the federal

245. True abandonment of these policies would not mean non-citizen reservation residents would have to leave the reservation. It would only mean that they would be subject to tribal authority, just like anyone else who owns land or resides in a state or nation of which he or she is not a citizen.

246. See Porter, *The Demise*, *supra* note 13, at 171–72 (explaining that as more Indians become involved in the federal political process, these individuals feel like participants within the federal political system, rather than peoples outside of the federal political process diplomatically involved as part of a sovereign Indigenous nation); Porter, *Two Kinds of Indians*, *supra* note 13, at 642 (expressing the belief that the very fact that many Indians view themselves as American citizens is evidence that such individuals are now “Native American” instead of Ongwehoweh).

247. See generally THE ANTIFEDERALISTS, *supra* note 184, at xli–xlii (explaining that the Antifederalists failed to understand the Constitution proposed a government of limited powers that would not “stamp out diversity” or “require uniformity”).

248. See *supra* note 190.

government—either Congress or the courts—will likely one day implicitly, or possibly explicitly, hollow out tribal sovereignty as the logical conclusion of tribes’ perceived consent to non-tribal authority by participation and the *imperium in imperio* problem. By not affirmatively choosing to incorporate, tribes give up bargaining position that could be used to secure advantages of sovereignty that might not survive incorporation otherwise.

Right now, tribes have a measure of independence that states generally oppose. That independence represents something the states want, or more accurately, want to eliminate. However, if tribes continue to participate in state politics without seeking some segregation of authority, tribal independence will likely one day disappear as a result of the state-tribal competition for sovereignty, thus dissolving any previous bargaining advantage. Alternatively, tribes could affirmatively seek to incorporate into the surrounding state but make incorporation contingent on the preservation of some measure of the advantages they enjoyed prior to incorporation. Tribes pursuing this course would also need to make sure any such concessions could not easily be undone post incorporation. Examples of advantages tribes might preserve would be legalizing certain types of gaming that would otherwise be prohibited, control of environmental standards within the former tribal territory, preservation of hunting rights, preservation of fishing rights, and preservation of sacred sites. Tribes might also be able to preserve access to specific federal benefits, like the Indian Health Service.²⁴⁹ Tribes would likely be unable to preserve exemptions from state taxation, but states would also assume responsibility for spending those taxes for the benefit of the former tribal citizens and the former reservation area. Admittedly, securing these advantages might prove politically and legally difficult. That difficulty will need to be part of the equation in deciding whether or not to incorporate.

249. The tribe would cease to be politically autonomous, but federal benefits are not necessarily dependent on enrollment. *See* Del. Tribal Bus. Comm. v. Weeks, 430 U.S. 73, 84–86 (1977) (holding Congress’ exclusion of group of Indians from receiving share of distribution of tribal assets permissible where decision is “‘tied rationally to the fulfillment of Congress’ unique obligation toward the Indians’”); *Wallace v. Adams*, 204 U.S. 415, 423–25 (1907) (holding that Congress can authorize review of citizen determinations by tribal courts); *Simmons v. Eagle Seelatsee*, 244 F. Supp. 808, 813–15 (E.D. Wash. 1965), *aff’d*, 384 U.S. 209 (1966) (denying heirship and benefits under statute defining tribal membership as enrolled members with a minimum quantity of Indian blood); Robert McCarthy, *The Bureau of Indian Affairs and the Federal Trust Obligation to American Indians*, 19 BYU J. Pub. L. 1, 121 (2004).

From an ethical point of view, tribes choosing not to affirmatively seek either incorporation or separation create opportunities for federal courts to further undermine the sovereignty of all tribes. Cases resulting from the continued conflict between state and tribal sovereignty affect the destiny of all tribes and could affect the sovereignty of tribes in the process of trying to separate from state government. Attempts to avoid litigation will to some extent limit the chance of an adverse decision, but avoidance will not always be possible. The possibility exists that the actions of tribes choosing to continue participating but not incorporating will hasten the erosion of tribal sovereignty faster than tribes making different choices can prepare for that erosion.

3. *Choosing Some Measure of Separation*

Tribes can also avoid piecemeal destruction of their sovereignty by creating some measure of separation from state government. Two possibilities for doing this are: (1) segregation of authority, similar to what the Tenth Amendment does between the state and federal governments; or (2) comprehensive sovereign separation from the surrounding state, similar to the separation states have from each other. The goals may be simple to point out, but it is no secret that seeking any such separation will be difficult. Tribes have inherited a long history of comprehensive antagonism to their independence. Changing the trajectory of tribal sovereignty—changing the assumptions about whether tribal governments deserve the same rules and respect that state governments do—will take similar clear, comprehensive, consistent action, just like modification of any long-standing belief or behavior.

a. *Measure of Separation by Limiting Authority*

The first option—segregating, or limiting, authority—focuses on separating how tribal and state authority overlap in terms of subject matter, as opposed to how they overlap in terms of person and place. Pursuing this option would likely involve some type of negotiated agreement between tribes, states, and the federal government.²⁵⁰ The specific language, form, and process of adoption for any law segregating authority is beyond the scope of the present article, but using some form of affirmative law seems necessary under this approach

250. COHEN, *supra* note 45, at 589–94.

given that the federal government has proven unwilling to maintain a coherent sovereign boundary. Affirmative law would, to a large extent, remove the placement and solidity of the tribal-state boundary from the schizophrenia of federal Indian law jurisprudence. However, the adoption of any law changing the sovereignty or territory of a government would certainly involve considerable political, electoral, and procedural hurdles at all levels to say the least, hurdles that tribes would not have complete control over—a factor weighing against pursuit of this option. Beyond these hurdles, such agreements would likely cut both ways. On the one hand, the agreement itself would implicitly acknowledge the sovereignty of the tribe. On the other hand, reaching agreement would likely require additional cessions of sovereign authority, territory, or resources.²⁵¹

Whatever form the proposed limiting law takes, it should employ a retained-rights paradigm, similar to how authority is divided between the states and the federal government under the Tenth Amendment. For instance, the agreement might read: “The powers not delegated to the United States or the State by this agreement, nor prohibited by it to the Tribe, are reserved to the Tribe, or to the Tribe’s citizens.”

The idea here is to leave as little authority in the hands of the state and federal governments as possible, leaving the “vast inherency” to the tribe. Unfortunately, this two-tiered limitation has an inherent flaw. Even if governing authority can be split three ways, it is an open question how much authority will be left to the tribe.

b. Comprehensive Separation

To pursue the second option—comprehensive political separation from the state—tribes need to take steps to sever the connections between state government, reservation citizens, and reservation territory. This will require action on several fronts, each focusing on

251. Some scholars have heralded intergovernmental agreements as a means to achieve an adequate division of authority and the future of tribal-state coexistence, borrowing from the example of the use of such agreements in the state-to-state context. See Matthew L.M. Fletcher, *Reviving Local Tribal Control in Indian Country*, 53 FED. LAW. 38, 42–43 (2006); Matthew L.M. Fletcher, *Retiring the “Deadliest Enemies” Model of Tribal-State Relations*, 43 TULSA L. REV. 73, 82–87 (2007). Certainly such agreements help solve discrete problems and present opportunities for cost sharing. However, the viability of the agreements as a means of reaching broader issues of sovereign division is questionable. See COHEN, *supra* note 45, at 589–94; Ezra Rosser, *Caution, Cooperative Agreements, and the Actual State of Things: A Reply to Professor Fletcher*, 42 TULSA L. REV. 57, 62–73 (2006).

ending the ways tribal and state authority overlap with regard to person and place. The first important nexus that must be separated is dual citizenship.

i. Separating Tribal Citizen from State Citizen

As stated earlier, reservation citizens consent to state authority by voting in state elections.²⁵² By living on the reservation, they bring that authority inside tribal territory. Unfortunately, tribes have no control over who the surrounding state considers eligible to vote in state elections, i.e. is a state citizen. Any effort to create civil or criminal penalties associated with participation in state politics would likely invite challenges under voting rights laws—misguided though they may be—at a time when tribes are better off keeping decisions about their sovereignty out of court. That said, tribes still retain considerable discretion in determining their own citizenship.²⁵³ This situation raises the possibility of disenrollment as a tool. As controversial as such a measure would surely be, it is not without precedent.

Certain voluntary actions done with intent to renounce citizenship will result in the loss of U.S. citizenship.²⁵⁴ Such actions include becoming a citizen of another country, declaring allegiance to another country, serving in government office of another country when such service requires an oath of allegiance, or formally renouncing allegiance to a State Department Official while abroad.²⁵⁵ Conversely, those seeking U.S. citizenship via naturalization must pledge “to renounce and abjure absolutely and entirely all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which the applicant was before a subject or citizen” and “to bear true faith and allegiance to the [Constitution and the laws of the

252. See *supra* Part IV.A.

253. See generally *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 49 (1978) (upholding tribal ordinance denying membership in tribe to children of female members who married outside the tribe while extending membership to children of male members who married outside the tribe); *Red Bird v. United States*, 203 U.S. 76, 95 (1906) (affirming that only such white persons as intermarried with Cherokees by blood prior to November 1, 1875, were entitled to any share in the Cherokee property, or to be enrolled for that purpose); *Roff v. Burney*, 168 U.S. 218, 223 (1897) (affirming the validity of Chickasaw decision to withdrawing tribal citizenship from wife, and therefore husband); *Smith v. Babbit*, 100 F.3d 556, 558 (8th Cir. 1996) (discussing sovereignty of Indian tribes in determining tribal membership).

254. 8 U.S.C. § 1481(a) (2006).

255. *Id.*

United States]”²⁵⁶ Other countries have similar statutes.²⁵⁷ These acts provide a strong indication that the individual in question has withdrawn consent to being a citizen or has transferred allegiances.

The U.S. Supreme Court has specifically held that voting in a foreign election does not constitute such an act,²⁵⁸ but that has not always been the case²⁵⁹ and the difference between the voluntary act of voting and the voluntary acts currently resulting in loss of citizenship seems scant. Citizenship in a country is usually a pre-requisite to voting in a country. Citizens of one American state who subsequently vote in the elections of another state generally lose their citizenship in the first state.²⁶⁰ Some tribes historically had similar laws. The Iroquois considered participation in another government’s affairs grounds to exclude those doing so from leadership within the Iroquois Confederacy.²⁶¹

Tribes could adopt similar rules to resolve the dual-citizenship problem by automatically disenrolling any *reservation* citizen who votes in a state election, files to run for state office, or serves in elected state office.²⁶² A preemptive measure may seem severe, but any law requiring affirmative enforcement will likely leave the vast majority of dual citizenship cases intact, even if a tribe expends considerable

256. *Id.* § 1448(a) (alteration in original).

257. See, e.g., Yousef T. Jabareen, *Constitution Building and Equality in Deeply-Divided Societies: The Case of the Palestinian-Arab Minority in Israel*, 26 WIS. INT’L L.J. 345, 370 n.82 (2008) (discussing the Israeli requirement of renouncing foreign citizenship); Annelies Lottman, *No Direction Home: Nationalism and Statelessness in the Baltics*, 43 TEX. INT’L L.J. 503, 506–514 (2008) (discussing the legislative schemes used to address citizenship questions by the Baltic states upon declaring independence from the Soviet Union); John Rockwell Snowden et al., *American Indian Sovereignty and Naturalization: It’s a Race Thing*, 80 NEB. L. REV. 171, 181–84 (2001) (discussing the history of the U.S. citizenship laws); Peter J. Spiro, *Questioning Barriers to Naturalization*, 13 GEO. IMMIGR. L.J. 479, 504–08 (1999) (discussing the requirement of the renunciation oath for citizenship in the United States and its gradual move towards ineffectiveness).

258. *Afroyim v. Rusk*, 387 U.S. 253, 267 (1967).

259. *Id.*

260. See ALASKA STAT. § 15.05.020(6) (2009); ALASKA STAT. § 15.25.043(3) (2009); GUAM CODE ANN. tit. 3 §9124(f) (2008); HAW. REV. STAT. § 11-13(7) (2009); N.M. STAT. § 1-1-7(H) (1978); OHIO REV. CODE ANN. § 3503.02(H) (2007); OR. REV. STAT. § 247.035(e) (2009); 25 PA. CONS. STAT. § 2814(h) (2007); WIS. STAT. § 6.10(10) (2004); *Klumper v. Van Allred*, 811 P.2d 75, 79 (N.M. 1991).

261. See Chief Irving Powless, Jr., *supra* note 46, at 1083; Porter, *The Demise*, *supra* note 13, at 159; George, *supra* note 52; Hauptman, *supra* note 52.

262. Tribes could enforce such laws by regularly comparing tribal citizenship records with county voting records.

resources on policing.²⁶³

Reasons exist for adopting a more comprehensive law to control dual citizenship, one that would disenroll any *tribal* citizen, regardless of residence, who votes in a state election, files to run for state office, or serves in elected state office. First, participation by off-reservation tribal citizens implies some level of acceptance of state authority by the tribe because all tribal citizens, regardless of residence, constitute part of the tribe. While some may see little harm in voting by off-reservation tribal citizens, consider that resident aliens in the United States, and United State citizens abroad, generally do not vote in the elections of the countries in which they reside. The same can be said of U.S. citizens from one state who temporarily reside in another, such as college students or military personnel. Second, and more importantly, off-reservation tribal citizens who participate in tribal elections represent an inverse corollary to reservation citizens who participate in state elections. Specifically, off-reservation tribal citizens who vote in tribal elections participate in making laws that affect the reservation, and therefore not necessarily themselves or where they live, including decisions about the allocation of government resources.

The dilemma presented by off-reservation tribal citizen voting deepens because most agree that off-reservation citizens have some degree of connection with their tribal homeland and allegiance to their tribal government. Those who left the reservation generally did so for reasons unrelated to allegiance to the tribe, or investment in its well-being, for example school or employment. Consider a hypothetical tribe that lives “within driving distance” of a large city where many tribal citizens have migrated. Assume the tribe has (a) a high incidence of diabetes, (b) bad reservation roads, (c) a rundown school building with too few teachers, and (d) a significant budget surplus. The tribe could (1) distribute the funds as per capita payments, (2) invest in the reservation’s roads, (3) remodel the school, (4) hire more teachers, (5) create a language retention program, (6) build a dialysis center on the reservation, or (7) build a dialysis center in the nearby city. There are no objectively “right” or “wrong” choices, but how tribal citizens respond to this situation, and

263. Given the Supreme Court’s use of participation-based reasoning to limit tribal authority over non-citizens living on the reservations, tribes might consider ways to allow non-citizen reservation residents to participate in reservation government in some fashion. Unfortunately, such a discussion is beyond the scope of the present paper.

others like it over time, will affect the tribe's sovereign character and whether surrounding governments acknowledge and validate that sovereign character.

Recognizing this problem, some tribes have responded by requiring voters to reside on the reservation or requiring in-person voting on the reservation.²⁶⁴ Tribes not comfortable with completely severing the relationship with off-reservation tribal citizens could fashion a new, intermediate category of political relation, possibly categorized as "members." The exact nature of this intermediate political relationship would depend on the individual circumstances of the tribe in question. A full discussion of the possibilities here is beyond the scope of the present paper, but one possible configuration would give individuals in this category access to tribal services and benefits, but exclude them from suffrage. This structure would have the added benefit of preserving federal funding levels.²⁶⁵

Given the severity of disenrollment, significant post-deprivation due process protections would be appropriate. Tribes should consider carefully the burdens of persuasion and standard of proof involved in any post-disenrollment hearing, taking into account the reliability of state and tribal voting records, among other factors. Provisions might also be made to allow disenrolled individuals to re-enroll on certain conditions, such as expiration of a minimum period of disenrollment, tribal service, an oath of allegiance, or some combination thereof.²⁶⁶ Tribes adopting such a law should also set its effective date far enough in the future to allow tribal members to remove their name from the state voter rolls beforehand.²⁶⁷ The effects of disenrollment also should be limited to the individual who registers to vote in a non-tribal election, avoiding any impact on the tribal citizenship of relatives or descendants.

264. See, e.g., CONST. AND BY-LAWS OF THE ALABAMA AND COUSHATTA TRIBES OF TEXAS, art. V, § 1, *available at* <http://thorpe.ou.edu/IRA.html>; Oneida Tribe of Indians of Wisconsin, ONEIDA CODE OF LAWS, ch. 2.8 § B, *available at* <http://www.oneidationation.org/government/lawsandpolicies/oneidacodeoflaws.aspx>.

265. See Margo S. Brownell, *Who Is An Indian? Searching for an Answer to the Question at the Core of Federal Indian Law*, 34 U. MICH. J.L. REFORM 275, 276 (2001) (discussing census calculations and the effect on federal funding for Native American tribes).

266. It warrants mentioning that disenrollment does not affect the culture of a disenrolled individual, although many will surely feel that way. The inability to vote in tribal elections will not affect disenrollees' ability to live their lives according to traditional customs, beliefs, and values.

267. See generally KY. REV. STAT. ANN. § 116.0452(3)(a) (LexisNexis 2008); MD. CODE ANN., ELEC. LAW § 3-501(1) (LexisNexis 2009); N.Y. Election Law § 5-400(1)g (McKinney 2008).

It is important that tribes only disenroll citizens who actually vote in state elections, and allow them to register to vote with the state without consequence. Not registering to vote in state elections would have the additional consequence of making tribal citizens ineligible to vote in federal elections, a collateral effect with bothersome implications that need to be avoided. States set voter qualifications, thereby controlling who votes, subject to Constitutional limitations.²⁶⁸ States do not separate qualifications for state elections from qualifications for federal elections. Hence, anyone who does not register to vote in state elections becomes ineligible to vote in federal elections. The prospect of foregoing federal suffrage should give pause to pro-tribal interests. Federal legislation, policies, and programs affect much of reservation life, a strong argument for continued federal participation.²⁶⁹ Tribes' political/diplomatic leverage relies in large part on their ability to affect federal elections via reliable voting blocks.

ii. Separating Tribal Territory from State Territory

Disenrolling individuals who vote in state elections ends the problem of dual citizenship, but disenrollees living on the reservation could still participate in state elections while there. The same can be said for non-tribal citizens living on the reservation, of which there are many. These territorial aspects have to be dealt with as well, but with different measures.

To begin, tribes need to legislatively oppose the implied annexation that arises from the establishment of state voting and legislative

268. See U.S. CONST. art. I, § 2; U.S. CONST. amend. XVII; *Katzenbach v. Morgan*, 384 U.S. 641, 647 (1966).

269. Some states exercise substantial law making and enforcement powers over reservation territories pursuant to Public Law 280, suggesting a similar argument in favor of continued tribal participation in state political processes in such cases. However, the powers exercised by states and the implications of participation in state political processes differ from those in the federal context making state participation inadvisable if the affected tribes wish to avoid further losses of sovereignty. First, in contrast to the many tribes and tribal peoples who consented to federal citizenship, the vast majority of tribes and tribal peoples opposed, and continue to oppose, incorporation into the surrounding states. See *supra* notes 37–43 and accompanying text. Second, precedent exists for dual citizenship with the federal sovereign. American federalism, if fully embraced in the tribal context, would avoid sovereign competition through limitation of federal authority, and thereby avoid erosion of the tribal sovereignty. See *supra* Parts IV.B., IV.C.1. No comparable mechanism for dividing sovereignty three ways (tribal-federal-state) presently exists. Without such a limitation, tribal sovereignty will suffer. See *supra* Parts IV.A–B. Even if such a limitation could be devised, a three-way split of authority would leave fewer matters affecting tribal citizens and lands in tribal control.

districts on reservation lands. To do this, tribes need to adopt laws prohibiting the use of ballots within the reservation that include candidates for election to state office or measures concerning the adoption of proposed state laws. Tribes may need to seize voting machines, ballots, and other equipment as a regulatory measure to prevent votes from being cast,²⁷⁰ but need not impose criminal penalties for activities associated with state voting within tribal territory. Any regulatory method pursued by a tribe needs to anticipate challenges based on existing civil rights and voting laws, initiated or supported by any of the individuals and organizations with vested interests in continued on-reservation state voting. Note that ballots with only federal candidates and proposed laws should be allowed.²⁷¹ Customizing reservation ballots to include only federal candidates and laws would be no more difficult than the creation of the paper ballots used in each state county. Each county's ballots only include those candidates and measures applying to that county. Where states use electronic voting, this customization should be easier.

The last, and most problematic, step in bringing equitable coherence to territorial sovereignty in the tribal context is severing the legal connection that makes tribal authority within reservations contingent on the ownership status of the land. Ownership and governance have been largely separated for ages outside manorial or communist states.²⁷² Only in the reservation context have ownership and governance been unified. Non-Indian interests established this connection in an effort to rationalize an unethical annexation of territory via tortured logic out of sync with basic American sovereign concept. The situation arose, for the most part, as a result of the General Allotment Act—a unilateral act designed to take land from Indians and destroy tribes,²⁷³ a policy clearly at odds with any concept of government by consent. Changing the law would be consistent with a genuine abandonment of the allotment and termination policies.

Unfortunately, this answer is also politically difficult. Non-tribal

270. Any equipment or materials seized could be returned on the promise no further attempts would be made to establish polling places within tribal territory.

271. If tribes continue participating in federal political processes, tribes need seek a segregation of authority between the federal and tribal governments similar to the Tenth Amendment. *See supra* Parts IV.A–B., IV.C.1.

272. *See generally* Monette, *Governing Private Property in Indian Country*, *supra* note 167; Richard Monette, *Imposing Communism*, 12 LEWIS & CLARK L. REV. 991 (2008).

273. *See supra* Part II.E.1.

reservation residents in all probability would strongly oppose such a measure because it would make them subject to a government of which they could never be citizens.²⁷⁴ States would also oppose such a law because a change in the status of these lands would have a sizeable impact on ad valorem tax revenues.²⁷⁵

V. CONCLUSION

The question of whether tribal participation in non-tribal politics is a welcome wagon or Trojan horse is best answered in time-honored law school fashion—"it depends." Both positions are potentially "right." If the goal is incorporation into the non-tribal body politic, then the efforts of native peoples to obtain non-tribal voting rights and protect their ability to exercise those rights have been great victories, much like the victories achieved by other disadvantaged groups such as African Americans, women, and non-property owners. On the other hand, if the goal is asserting and maintaining tribes' status as separate sovereigns, then the same acts constitute grave losses and grave dangers. The one certainty is that trying to have it both ways is likely untenable if the Founders' ideas about *imperium in imperio* carry any real-world force. The pattern of tribes' losses of sovereignty, reflected throughout the body of Indian law one case at a time, suggests that *imperium in imperio* is indeed to blame to some extent.

In his decision in *Harrison v. Laveen*, Justice Udall wrote that "[t]o deny the right to vote, where one is legally entitled to do so, is to do violence to the principles of freedom and equality."²⁷⁶ The inverse also bears truth: extending the right to vote to those who reject the basic premise that voting constitutes consent to be governed also does violence to the principles of freedom and equality. The same can be

274. ALEINIKOFF, *supra* note 227, at 114–17.

275. See Press Release, Sen. Schumer, Rep. Arcuri: *Local Communities, Taxpayer Must Have Better Protections Against Land Into Trust*, U.S. FED. NEWS (July 15, 2009), available at 2009 WLNR 13408750 ("I have long expressed my serious reservations about the land into trust process," said Senator Schumer. "One of my fundamental concerns is that taking land into trust will deprive local governments of much needed revenue to pay for schools, road maintenance, and other crucial county functions, and that the gap will have to be made up by local taxpayers. This bill will ensure that counties are reimbursed for any possible property tax base loss, and provide some measure of protection against these decisions."); Brian Barber, *Council to Vote Next Week on Arkansas River Land Measure*, TULSA WORLD, July 21, 2009, available at http://www.tulsaworld.com/news/article.aspx?subjectid=298&articleid=20090721_298_0_TlasCt632255.

276. 196 P.2d 456, 459 (1949).

said for seeking the right to vote under the same circumstances. Participation in state politics by reservation citizens represents a hypocritical position inconsistent with fundamental American democratic concepts. Tribes need to recognize this conflict and take commensurate remedial action. Commensurate action does not mean action based on idealistic goals. Rather it is what is necessary to counteract the situation with which tribes are faced. Commensurate action must be determined by what will sufficiently respond to the situation at hand, not the ease or difficulty of the action required. It should be the starting point from which to systematically choose the best possible course from many alternatives. Looking outside this set of alternatives is to consider options that will not achieve the ultimate goal being sought.

In this instance, tribes face the consequences of continued participation in federal and state elections. If consent by participation represents a subtext to the sovereign struggle between tribes and states, and the Founders' fears regarding dual sovereignty have any validity, continued participation by tribes will eventually hollow out tribal sovereignty. The general downward trajectory of tribal sovereignty suggests these concepts are indeed at play. The progression has largely followed the incremental pattern predicted by Anti-Federalist thinkers. There have been plateaus and small victories, but overall, tribes have lost ground.

To take commensurate action, tribes need to keep tribal, state, and federal sovereignty from conflicting. If we assume federal lawmaking with regard to tribes will continue regardless of reserved treaty rights, tribes have a legitimate claim to participation in that process. However, a limitation on federal sovereignty over tribes needs to be established if the federal-tribal relationship is ever to reach an equitable, sustainable equilibrium, and not result in the asphyxiation of tribal sovereignty. On the state level, tribes can either combine with the surrounding states to form one sovereign, or create more separation between themselves and the surrounding states. Tribal-state separation can be achieved via a limitation similar to the Tenth Amendment of the U.S. Constitution, or by greater respect for sovereign boundaries, similar to the respect given to the boundaries between states. The present jurisdictional patchwork is confusing, tortured, and out of line with basic sovereign concept. Consequently, the solution must bear an opposing amount of clarity, if not ease of execution.

One way tribes can advocate for the changes proposed by this

article is to base their arguments on the basic tenets of sustainable, equitable government accepted by most Americans as objective truths. If government by consent is an objective truth, it has to be true for everyone, including tribal peoples. Similarly, if the dangers of human self-interest and consolidated federal power are objective truths, then they exist everywhere, and everyone needs protection from them, tribal and non-tribal alike.

Analogizing the conceptual tensions found in Indian law to the struggles faced by the Founders in forming the American republic might be one way to convince non-tribal people of the need for uniform application of these concepts. If non-tribal people can be convinced of this analogy, they would have to concede that the present state of affairs utterly fails to meet the “government by consent of the governed” ideal, and embodies the polar opposite of the limited federal power contemplated by the Tenth Amendment. Unless non-tribal peoples are ready to assert that the Founders’ concerns about government by consent, *imperium in imperio*, and the need for the Tenth Amendment were completely without merit, it would seem that they have to concede the need to establish a limit on federal and state authority in the tribal context, and give tribal people increased autonomy.

Some will respond to this article by arguing that the benefits of participation in state and national politics show the need for continued participation. Unfortunately, this approach only suggests which choice tribes should make, not whether a choice needs to be made. Others will say the analysis this article offers fails to acknowledge “the actual state of things;” however, that is a matter of perspective. It is axiomatic that tribes and tribal citizens need to make the best of what they have and not strive for unrealistic goals. That said, tribes and tribal citizens still need to be aware of the broader implications of the choices they make within that caveat and strive for meaningful goals. Just as nature abhors a vacuum, the law and society abhor hypocrisy and inconsistency. The gravity of coherent doctrine prevails over time versus the political exigencies or opportunities of the day. Societal, political, and legal pressures created by policies inconsistent with fundamental concepts are eventually resolved by reconciling the inconsistencies.

Tribes need to take control of how the tension between tribal participation in non-tribal politics and the fundamental American concepts herein discussed will eventually resolve. In the past, non-tribal interests have blithely abandoned fundamental tenets of

American governmental philosophy and law when it comes to tribal peoples. Things that would be unthinkable in non-tribal contexts somehow become acceptable, if not clearly appropriate. Somehow, “consent of the governed” just does not matter when it comes to making native people citizens, acquiring tribal lands, or allowing states to collect tax revenues outside state borders. Now, if it takes more effort to rationalize abandoning closely held tenets than to abide by them, non-tribal interests will certainly start embracing the concept of consent by participation in the tribal context more fully when they realize it can be used to eliminate what they perceive as the inconvenience of tribal sovereignty.